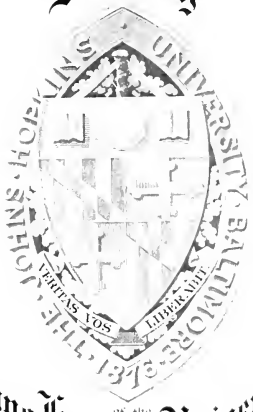


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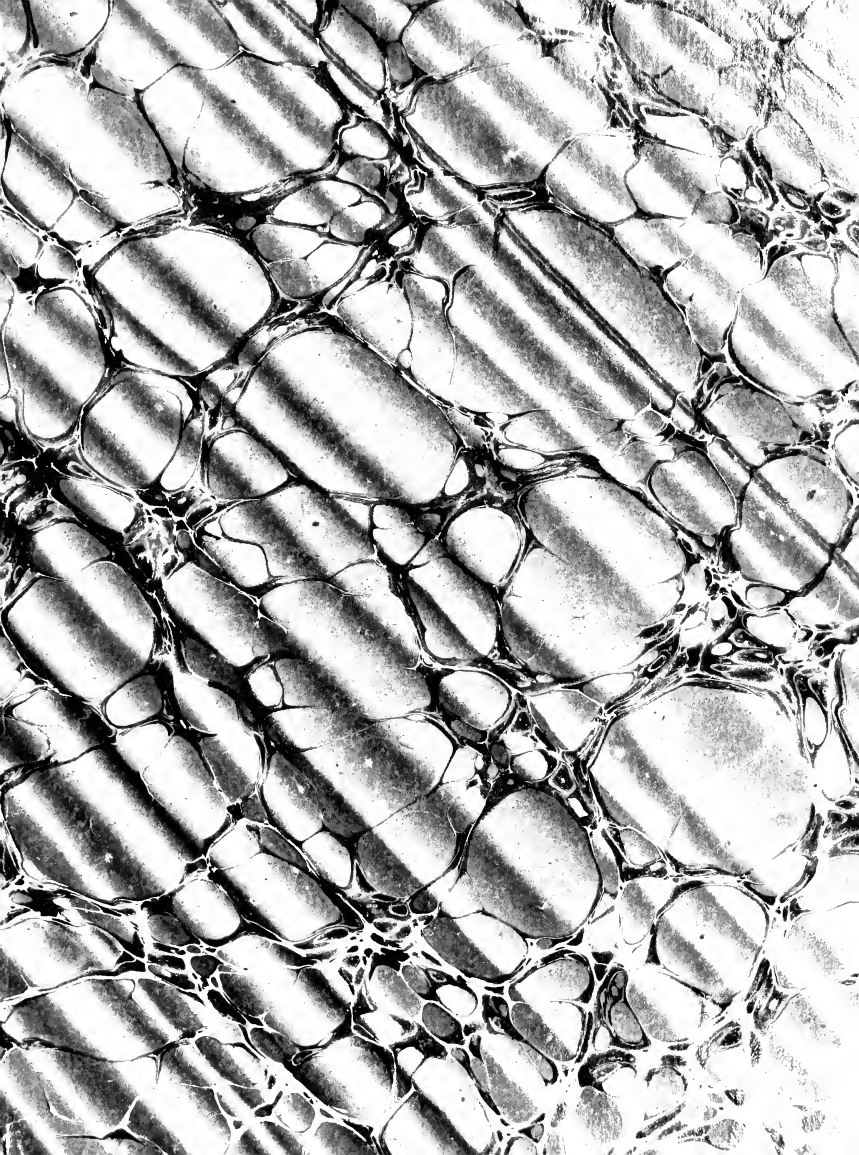


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## THE FREEDMEN'S BUREAU AND CIVIL RIGHTS BILLS.

To get at the basis of the Fourteenth Amendment, to grasp it's true meaning and purpose, as well as to understand the object of it's framers and of the people, it is necessary to analyze the legislation which preceded and followed the adoption of the Amendment, the causes or alleged causes which led to such legislation and to the proposal and adoption of the Amendment. The legislation preceding the adoption of the Amendment will probably give an index to the objects Congress was striving to obtain, or to the evils for which a remedy was being sought, while the legislation which followed it's adoption will give at least a partial interpretation of what Congress thought the Amendment meant and what things or subjects it included. This legislation, together with the debates in Congress, while being considered by that body, as well as the debates on the Amendment itself, should afford us sufficient material and facts on which to base a fairly accurate estimate of what Congress intended to accomplish by the Amendment. In fact, a careful analysis of these measures and debates should enable us to state with as much certainty as most conclusions are stated just what object or objects Congress and the framers of the Amendment had in view in submitting it to the States for ratification. As to what the people or the States thought of it, will be considered in a later chapter.

A caucus of the Republican members of the House was held on Saturday, December 2d, 1865. Thaddeus Stevens, by tacit consent, assumed the leadership and submitted the following plan to the caucus: 1. To claim the whole question of reconstruction as the exclusive business of Congress. 2. To regard the steps that had already been taken by the President for the restoration of the Confederate States as only provisional, and, therefore, subject to revision or reversal by Congress. 3. Each House to forego



the exercise of it's function of judging of the election and qualifications of it's own members in case of those elected by the Southern States. This plan was accepted without objection. The caucus also directed the clerk of the House to omit from the roll all members from the Southern States and ordered that a joint resolution for the appointment of a joint committee of fifteen be introduced. This Committee was "to inquire into the conditions of the States which formed the so-called Confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress", and providing that "until such report be made and acted upon by Congress no member from such States be received into either House." This programme was carried out in the House on the following Monday. (1)

This caucus and it's programme was but foreshadowing the struggle that was to take place between the President and Congress over the question of reconstruction.

The Freedmen's Bureau Bill is the first, in point of time, of the efforts of Congress to reconstruct the Southern States. The original bill was enacted March 3d, 1865, and was to expire one year after the termination of hostilities. It's object was to protect and support the freedmen who were within the territory controlled by the Union forces.

The Thirty-ninth Congress assembled in December, 1865, and on January 5th, 1866, Mr. <sup>new</sup>Turnbull introduced a bill to enlarge the powers of the Freedmen's Bureau. This bill was referred to the Judiciary Committee of the Senate, of which Mr. <sup>new</sup>Turnbull was Chairman, from which it was reported back six days later with amendments. Aside from the subject matter of this bill, it's consideration is very important as showing the feelings and tendencies of Congressmen near the opening <sup>of</sup> the session, the gradual weakening of the conservatives, and their <sup>new</sup>fixed union with the Radicals.

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(1) Dewitt, The <sup>T. C. C.</sup>Time and Impeachment of Andrew Johnson, pp. 27 - 28, and the Congressional Globe, 1st Sess., 39th Cong., pp. 5 - 6.



The bill, as reported from the Committee of Mr. Turnbull, consisted of eight sections, the seventh and eighth of which are of importance to us. The other sections authorized the President to divide the country into districts, to appoint commissioners, to reserve from sale or settlement certain public lands in Florida, Mississippi and Arkansas, which were to be allotted to the loyal refugees and freedmen in parcels not exceeding forty acres, and to direct the commissioners to purchase sites or buildings for schools and asylums.

The seventh section, which is of greatest importance, declares it to be the duty of the President to extend military protection and jurisdiction over all cases where any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell, hold and ~~any~~ <sup>real</sup> ~~or~~ personal property, and to have the full and equal benefit of all laws and proceedings for the securing <sup>to</sup> of person and estate, are refused or denied, in consequence of local law, customs, or prejudice, on account of race, color, or previous condition of servitude, or where different punishments or penalties are inflicted than are prescribed for white persons committing like offenses.

The eighth section was ~~punitive~~ <sup>penal</sup> in its nature, making it a misdemeanor, punishable by a fine of \$1000.00, or imprisonment for one year, or both, for any one to deprive another of any of the rights enumerated in the preceding section on account of race, color, or previous condition of servitude. These two sections of the bill were only to apply to those States or districts in which the ordinary course of judicial proceedings had been interrupted by the war. The officers and agents of the Bureau were to hear and determine all offenses committed against the provisions of this section, as well as all cases where there was discrimination on account of race or color, under such rules and regulations as the President, through the War Department, might prescribe. (2)





The whole bill may be said to be a war measure applicable in time of peace, for military officers were to be put in charge of the districts. There seems to be little doubt but that it was unconstitutional and that it could scarcely be justified even as a war measure. The measure was unwise and inexpedient to say the least of it, for it retarded rather than aided reconstruction.

Besides providing for military courts, the bill took from the states matters which the states and local communities had up to that time entirely controlled, for never before had the Federal Government interfered or attempted to interfere with the rights of the states to determine who should be qualified to make and enforce contracts, sue and be sued, give testimony, inherit, etc.

It was claimed that the second section of the Thirteenth Amendment gave Congress the power to do anything, <sup>clear</sup> to leave to the freedmen all the civil rights that were secured to white men. Mr. Hendricks, of Indiana, denied that construction, holding that no new rights were conferred upon freedmen, and that the only effect of the Amendment was to break the bonds which bound the slave to his master. He also contended that the laws of Indiana, which did not permit negroes to acquire real estate, make contracts, or to intermarry with whites, would practically be annulled by the bill, since they were civil rights. He also regarded the right to sit on a jury as a civil right. (3)

Mr. Trumbull, replying to Mr. Hendricks, said that the provisions of this bill which would interfere with the laws of Indiana could have no objection there, since the ordinary <sup>cause</sup> of judicial proceedings was not interrupted. He held, however, that the second section of the Thirteenth Amendment was adopted for the purpose of giving Congress power to pass laws destroying all discriminations in civil rights against the black man. He denied that the bill interfered with the laws against the amalgamation of



the races, since they equally forbade the white man to marry a negro. While this bill was to be temporary, he stated that the Civil Rights Bill, which was then before Congress, was intended to be permanent and to extend to all parts of the country. It was incumbent on Congress, he declared, to secure this protection if the States would not. (4)

Senator Wilson, of Massachusetts, who later became Vice-President under General Grant, pointed to the fact that the laws of many of the Southern States were inconsistent with freedom, and that the Civil Rights Bill was to annul the black codes and put all under the protection of equal laws. (5) Mr. Davis tried to amend the bill to secure an appeal for the decision of the agents of the Bureau to the Courts, but all his amendments were rejected. (6) He also held that the bill was unconstitutional in that it invested the Bureau with judicial powers, these powers to be exercised by Army officers, and that it deprived the citizen of his right to trial by jury in civil cases contrary to the Seventh Amendment to the Constitution. He agreed with Mr. Hendricks as to its effect on the laws against the intermarriage of the races. He predicted that the Southern States would be kept out until Congress had passed some obnoxious amendments, had conferred suffrage on the negroes in the District of Columbia, had imposed the same odious principle on the South which most of the Northern States rejected with scorn, and had enacted the Freedmen's Bureau and Civil Rights Bills. (7)

The bill was passed in the Senate, January 25th, 1866, by a vote of 37 to 10, the vote being strictly partisan. (8)

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(4) Ibid., pp. 321 - 323,  
 (5) Ibid., p. 340.  
 (6) Ibid., pp. 377 - 400.  
 (7) Ibid., pp. 415 - 19.  
 (8) Ibid., p. 421.



The bill was then debated in the House at considerable length. Mr. Dawson, of Pennsylvania, in opposing it, stated that he regarded the privileges or rights <sup>accorded</sup> ~~exercised~~ by the fourth, fifth and sixth amendments as ~~the~~ the birthright of every American. He asserted that the Radicals held that both races were equal, socially and politically, and that this involved the same rights and privileges at hotels, in railway cars, in churches, in schools, the same right to hold office, <sup>to</sup> sit on juries, to vote, to provide over courts, etc. (9) While ~~this~~ interpretation probably could not be given to the bill itself, it yet shows <sup>that</sup> ~~that~~ some of the minority thought and felt to be the inevitable result of the doctrines enunciated by the Radical leaders, and as will be seen later, those very principles were finally incorporated into the laws of the nation's Government by the party and man who denied having any such intentions.

Mr. Kear, (10) of Indiana, and Mr. Marshall, of Illinois, were of the opinion that the thirteenth Amendment did not authorize the bill. The latter asserted that if the bill were carried out, it would be in the power of the Federal Government to establish military tribunals in every State where there was discrimination against negroes. He regarded the right to sit on juries, to marry and to vote, <sup>and</sup> civil rights, and which could not, therefore, be denied on account of race or color. (11)

Mr. Rousseau, of Kentucky, said that under the operation of the bill a minister refusing to marry a negro and white person would be committing a criminal act and would consequently be subject to a penalty imposed by the eighth section. He also declared that it gave negroes <sup>the</sup> the same privilege in railway cars and theaters, and that there would be mixed schools where it was in operation. He cited a letter from Charleston to show that he was right in regard to schools, and declared that no one could successfully combat his position, and while he was interrupted several times, no one

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(9) Ibid., P. 541.

(10) Ibid., p. 623.

(11) Ibid., pp. 625 - 29.



questioned his statements in regard to these things. (12)

Mr. Moulton held that the right to sit ~~in~~ juries and the right to marry were not civil rights, but Mr. Thornton of the same state thought otherwise. (13) Mr. Grinnell, of Iowa, seemed to regard the right to bear arms a civil right, for in giving evidence to show that the bill was needed in Kentucky, he pointed to the fact that negroes were not allowed to keep a gun, to sit on the jury, or to vote. (14) Mr. Eliot, of Massachusetts, who had charge of the bill in the House, moved an Amendment to the seventh section by inserting as one of the rights to which negroes were entitled "the constitutional right to bear arms." (15) Since the House adopted this Amendment, which was also concurred in by the Senate, it is evident that the right to bear arms was regarded as one of the rights pertaining to citizens, and as this right is secured by the second Amendment, it may reasonably be inferred that the other rights and privileges secured or enumerated by the first eight Amendments, were also regarded as belonging to all persons. The bill passed the House February 6th, 1860<sup>6</sup>, by a vote of 136 to 33 (16) - only one Republican (from Missouri) voting in the negative.

When the bill was again before the Senate, with the House amendments, Mr. Turnbull remarked that the amendment as to the right to bear arms did not alter the meaning of the section. That is, that the right to bear arms being a civil right secured by the Constitution would have been secured to the negroes by the bill in its original form. (17).

(12) Ibid., Appendix, pp. 69 - 71.

(13) Ibid., p. 632

(14) Ibid., p. 651.

(15) Ibid., p. 654

(16) Ibid., p. 688

(17) Ibid., p. 743.





On February 19th, the President returned the bill to the Senate with a veto message. He thought it not only inconsistent with the public welfare and unconstitutional in certain provisions, but also obnoxious to the objection that it did not define the civil rights and immunities to be secured to the freedmen by it. (18) Messrs. Davis and Trumbull were the only Senators who spoke on the veto. The former, in supporting it, declared that the intermarriage of the races, commingling in hotels, theaters, steamboats, and other civil rights and privileges, had always been denied the free negroes, until Massachusetts had recently granted them. (19) Mr. Trumbull spoke quite at length in opposition to the veto, but never denied or questioned the contention of Mr. Davis.

The veto was sustained February 20th, the vote being 30 to 18 in favor of the bill, and so not the necessary two-thirds to override the veto. (20)

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(18) Ibid., p. 916. Among other things he declared: "I share with Congress the strongest desire to secure to the freedmen the full enjoyment of their freedom and property, and their entire dependence and equality in making contracts for their labor; but the bill before me contains provisions which, in my opinion, are not warranted by the Constitution, and are not well suited to accomplish the end in view.---In those eleven States, the bill

subjects any white person who may be charged with depriving a freedman of 'any civil rights or immunities belonging to white persons' to imprisonment, or fine, or both, without, however, defining the 'civil rights and immunities' which are thus to be secured to the freedmen by military law. ---

"The trials, having their origin under this bill, are to take place without the intervention of a jury, and without any fixed rules of law or evidence. The rules on which offenses are to be heard and determined by the numerous agents are such rules and regulations as the President, through the War Department, shall prescribe. No previous presentment is required, nor any indictment charging the commission of a crime against the laws; but the trial must proceed on charges and specifications. The punishment will be not what the law declares, but such as a court-martial may think proper; and from these arbitrary tribunals there lies no appeal, no writ of error to any of the courts in which the Constitution of the United States vests exclusively the judicial power of the Country." This system, he said, of military jurisdiction could not be reconciled with the fifth and sixth Amendments to the Constitution of the United States.

Message is also in McPherson's reconstruction, p. 68. In his second veto of the bill, July 16th, 1866, he reaffirmed the objections given in his veto, February 19th, and referred to the civil rights bill which had been passed over his veto, April 9th as a further reason against the necessity



Messrs. Doolittle, Cowan, Dixon, Morgan, and Stewart were among the Republicans voting with the Democrats, but some of those who were able at that time, to be controlled by reason were soon won over by the Radicals. While the bill failed to become law, it was practically reenacted July 16th, 1866, over the veto of the President. His second veto was so short, however, that party discipline and prejudice were necessary to keep it from being sustained, as it could not have been sustained on it's merits. (21)

So bitter was the fight against the President at the time that both Houses passed the bill over the veto on the same day that it was received, without debate in the House and with two speeches in the Senate, even before the message was printed. (22)

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of the bill. In reference to the Civil Rights Bill, he declared: "By the provisions of the act full protection is afforded through the district Courts of the United States, to all persons injured and whose privileges, as thus declared, are in any way impaired; and heavy penalties are denounced against the person who wilfully violates the law. I need not state that that law did not receive my approval; yet it's remedies are far more preferable than those proposed in the present bill, the one being civil and the other military."

In reference to that part of the bill which made it possible for a man to be deprived of his property contrary to the fifth Amendment, he said: "As a general principle, such legislation is unsafe, unwise, partial and unconstitutional." McPherson's Reconstruction, p. 147.

(19) Globe, 39th Cong., 1st Sess., p. 936.

(20) Ibid., p. 943.

(21) Burgess: Reconstruction and the Constitution, p. 89.

(22) Blaine, in his "Twenty years of Congress", volume 4, p. 171, says: "It required potent persuasion, reinforced by the severest party discipline, to prevent a serious break in both Houses against the bill."



The Civil Rights Bill was undoubtedly the most important bill passed during the first session of the 39th Congress. It was a companion measure of the Freedmen's Bureau Bill, both being introduced at the same time by Senator Trumbull. Both bills ~~was~~ <sup>were</sup> also referred to the ~~same~~ <sup>same</sup> committee, ~~and reported~~ <sup>and reported</sup> back at the same time. Precedence was given, however, to the Freedmen's Bureau Bill, but after it's failure to become law, the Civil Rights Bill was taken up and debated at great length - the minority using every means possible to prevent it's passage.

The Radicals were very much chagrined by the successful veto of the Freedmen's Bureau Bill, and every effort was made to bring the ~~constitution~~ <sup>constitution</sup> into line. The party which was brought to bear with telling effect, as it was determined that the Civil Rights Bill should become law. The first section of the Civil Rights Bill was almost identical with Section 14 of the Freedmen's Bureau Bill as finally adopted, and it is to the first section of the Civil Rights Bill that we especially wish to direct attention, since it was to secure the provisions of this section that the first section of the Fourteenth Amendment was incorporated into ~~one~~ <sup>our</sup> Constitution. The first section was in fact the basis of the whole bill, the other sections merely providing the machinery for its enforcement.

Section one, as originally introduced, declared that there should be "no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, parties, and give evidence, ~~the~~ <sup>to</sup> inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains and penalties, and to none



other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." It was subsequently added that all persons born in the United States, and not subject to any foreign power, Indians not ~~to~~ being excluded, were citizens of the United States. (23) The purpose of this clause was to make a declaration that negroes were citizens of the United States, and so avoid the consequences of the Dred Scott decision. This is the only notable difference between the provisions of this section of the Civil Rights Bill and those of the Freedmen's Bureau Bill.

Mr. Trumbull, Chairman of the Senate Judiciary Committee, and the putative father of the Civil Rights Bill, said that the purpose of the bill was to destroy the discrimination made against the negro in the laws of the southern States and to carry into effect the Thirteenth Amendment. The second section of the amendment gave Congress the power to pass any bill that it deemed appropriate to secure the freedom conferred by the first section. He cited the laws of South Carolina and Mississippi to show that the negroes were discriminated against, and said that nearly all the state legislatures of the Southern States, which had met since the adoption of the Amendment abolishing slavery, had practically re-enacted the slave codes. The right to have fire-arms, to go from place to place, to teach, to preach, and to own property, he regarded as the rights of a freeman, and that the laws denying these rights to the negroes might properly be declared void. He was candid enough, however, to state, without being questioned, that the bill might be assailed on the ground that it gave to the Federal Government powers which properly belonged to the States, though he did not think it open to that objection, since it would have no operation in any State where the laws were equal.

In answer to the query of what was meant by the term "civil rights", he replied that the first section of the bill defined it, and that it did





not undertake to confer any political rights. (24) It seems evident, however, that the term "civil rights" was meant to include more than the specific rights enumerated in the first section of the bill, for Trumbull had a few minutes before, declared that the right to travel, to teach, to preach, etc., were rights which belonged to all and the bill was to secure them to all.

It must also be remembered that Mr. Trumbull had framed the Freedmen's Bureau Bill which had been passed by the Senate four days before, the seventh section of which was almost identical with the first section of the bill. That bill made the same enumeration of rights, but they were declared to be only a part of the civil rights and immunities of citizens.

Mr. Saulsbury, of Delaware, took a decided stand against the whole measure, declaring that it was not only unconstitutional, but that it was subversive of the true theory of our Federal system. His position was that the theory of those who advocated the bill would make the people subject to the absolute control of Congress, and that this was contrary to the intentions of the Fathers. He did not deny that those who voted for the Thirteenth Amendment might have intended to confer the power on Congress to pass such a bill as the one under consideration, but that such intention was not avowed at the time. In his opinion suffrage was a civil right and <sup>therefore</sup> would be conferred on negroes by the bill. The terms of the bill would be construed, he said, according to their legitimate meaning and import, and not according to what Mr. Trumbull intended. This bill, if enacted into law, would, he asserted, deprive the states of their police power, and would nullify the laws of his state which forbade negroes to keep fire<sup>arms</sup> or ammunition. (25)

(24) Ibid., pp. 474 - 76.

(25) Ibid., pp. 476 - 78.



This last statement was not questioned by any one, and since Mr. Trumbull also seemed to recognize that the right to keep arms was a right to which all were entitled, we may conclude that this right was intended to be conferred upon negroes if the States permitted white men to enjoy it. The right to keep and bear arms is recognized in the national Constitution but only to the extent of saying that the Federal Government could not deny the right, and not at all limiting the power of the States to determine who might exercise that right. As a further evidence that Mr. Saulsbury was correct in his opinion, we have already seen that the right to bear arms was specifically recognized as one of the civil rights in the Freedmen's Bureau Bill.

Mr. Van Winkle, of West Virginia, and Mr. Cowan, of Pennsylvania, both Republicans, thought the bill unconstitutional. Mr. Cowan went so far as to say that if the Constitution authorized the bill, then Congress had the power to overturn the States themselves. If the bill became law the statutes of Pennsylvania in regard to inheritancies would, he declared, be repealed and the law providing for separate schools would be nullified, thus making the school directors, should they execute the state law, criminals. In his opinion, the Amendment abolishing slavery was not intended to revolutionize the laws of the State, nor was it pretended that it did more than sever the bond that bound the slave to his former master, and that no wider operation could be given it than to even the relation between the master and his slave. (26) He also thought that the bill would nullify state laws in regard to ~~the same~~ (27)

Mr. Howard, of Michigan, a member of the Reconstruction Committee, spoke in defense of the bill, and in reply to Mr. Cowan said that he was a member of the Judiciary Committee at the time the Thirteenth Amendment was drafted and reported to the Senate; that he remembered very distinctly the views entertained by the members of that committee in regard to the Amendment; and that it was the intention of its friends and advocates to...

(26) Ibid, pp. 479 - 500.

(27) Ibid, p. 604



to give Congress the precise power over slavery and freedmen which was proposed to be exercised by the bill then under consideration. He said that they easily foresaw what efforts would be made by the south to deprive the freedmen of their rights and privileges, and that it was the purpose of the Amendment to give Congress the power to forestall or amend those efforts. (28)

Mr. Reverdy Johnson, of Maryland, who was probably the best constitutional lawyer in the 39th Congress, believed that the bill was unconstitutional. He even thought that it would nullify state laws against *miscegenation*. He thought he did not think the framers of it intended to do this. (29) If he, a good lawyer and a conservative man, thought the terms of the bill could be so construed as to do this, it is perfectly evident that the courts might fall into the same error, if indeed it be an error. He suggested that the bill should be made so plain as to obviate this difficulty, but his suggestion was not followed.

Some of the Senators from California, Oregon, Minnesota and other western States, wanted the first clause so amended as not to make Indians citizens, saying that the state laws which made it an indictable offense for a white man to sell arms or ammunition or intoxicating liquors to Indians, would be nullified, since it could properly be held that the Indians, if declared to be citizens, would have the same right to buy, sell, and use that kind of property as any other citizen.

Mr. Henderson, of Missouri, replying to these objections, said that it would not necessarily follow that such laws would be abrogated, since the States would still have the power to declare who were competent to make contracts, etc., just as they did in regard to minors. (30)

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(28) Ibid., p. 573.

(29) Ibid., p. 505.

(30) Ibid., pp. 572 - 74.



He seems to have been in error here, for in the same section of the bill it was stated that the right to make contracts, to buy, to sell, etc., could not be denied on account of race or color. It would thus be impossible for the States to say that Indians could not keep fire-arms or make contracts, since the law must apply equally to all races. There might be educational or age requirements, but such requirements would have to apply to all.

Mr. Davis, of Kentucky, seemed to think that, if the bill became law, suffrage would be conferred on the negroes, that *the bill* could not be prohibited by state law, and that a despotic central Government would be created. He characterized the bill as "outrageous", "un-constitutional", "iniquitous", "most monstrous", and "abominable". (31) Mr. Trumbull again reiterated the statement that the bill was applicable exclusively to civil rights and that it did not propose to regulate political rights or to confer suffrage. (32)

Mr. Guthrie, of Kentucky, a very fair minded man, said that Congress was legislating before the States had acted, before they had had time to legislate, and that the bill under consideration attempted to repeal state laws and to enact new laws for them, the enforcement of which was put in new hands. He denied that the people had intended by the Thirteenth Amendment to turn over <sup>the</sup> state governments and subject them to the dominion of Congress. (33)

Mr. McDougall, of California, opposed the bill both as a matter of constitutional law and of sound policy. He approved what was said by Senators Guthrie, Hendricks, and Cowan. (34)

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- (31) Ibid., pp. 595 - 99
  - (32) Ibid., p. 599.
  - (33) Ibid., pp. 600 - 01.
  - (34) Ibid., p. 604.





Mr. Saulsbury, just before the final vote was taken, offered an amendment inserting the words "except the right to vote in the States" after the words "civil rights." He contended that suffrage was a civil right, and since Mr. Trumbull had said that it was not the purpose or intention of the bill to confer suffrage, he wanted it so stated specifically. The amendment was rejected, however, by a vote of 39 to 7 (35) three Democrats voting against it, evidently thinking that suffrage was not conferred by it.

The bill was then passed by the Senate, February 2d, 1863, by a vote of 33 to 12, five being absent. (36) Among the negative votes were those of three Republicans, Cowan, Van Winkle, and Norton.

Mr. Wilson, of Iowa, Chairman of the Judiciary Committee, had charge of the bill in the House and opened the debate on it March 1st. It was not the object of the bill, he said, to establish new rights, but to protect and enforce those which already belonged to every citizen. It did not mean that all citizens should have the right to sit on juries, or that their children should attend the same schools, for those were not civil rights or immunities. He regarded civil rights as synonymous with natural rights. As to the clause declaring who should be citizens of the United States, he said that this was but declaratory of what was already the law, holding that all free persons born in the United States were citizens thereof. The opinion of Marshall in the celebrated case of McCulloch<sup>c</sup> vs. Maryland was cited to show that Congress was the sole judge as to the necessity of the measure, and it was declared that there could be no appeal from the decision of Congress except to another Congress. (37)

Mr. Cook, of Illinois, also took the position that Congress was the judge as to the necessity and appropriateness of legislation to secure the rights of freemen to those who had been freed. (38)

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(35) Ibid., p. 608.

(36) Ibid., p. 607

(37) Ibid., pp. 1115 - 18

(38) Ibid., p. 1124



Mr. Rogers, of New Jersey, one of the leaders of the minority, vigorously opposed the whole measure. He declared that the Amendment proposed by Mr. Bingham, and which had just been discussed in the House, was offered to authorize such a bill as this one. Mr. Bingham had offered that Amendment with the approval of the majority of the Reconstruction Committee, and it might properly be inferred that those who approved that Amendment, at least thought it doubtful whether Congress possessed the power to pass such a bill as the one then under consideration.

If Congress had the power to interfere with the state laws, regulating schools and marriage, it equally had the power, contended Mr. Rogers, to confer the election<sup>al</sup> franchise. In fact, he regarded suffrage as a civil right and as such would be conferred by the bill. Reference was also made to Secretary Seward's reply to the objections raised against the second Clause of the Thirteenth Amendment. (39) Governor Perry of South Carolina had wired the President that the only objection the Legislature had to the Amendment abolishing slavery was the second section which it feared might be construed to give Congress power of local legislation over both negroes and white men.

—To this telegram Secretary Seward replied that the objection to the second section was regarded as "querulous and unreasonable", since it really restrained, rather than enlarged the powers of Congress. These telegrams were sent to the Legislature by Governor Perry to be placed on "record as the construction which had been given to the Amendment by the executive department of the Federal Government." The Legislature, in ratifying the<sup>d</sup> amendment stated that it was understood that Congress could not legislate as to the political status <sup>of</sup> civil relations of the negroes.



Alabama and Florida added almost identical declaratory resolutions, to the effect that the Amendment was not to confer power upon Congress to legislate upon the political status of the freedmen in those States. (40)

Mr. Thayer, of Pennsylvania, declared that the bill could not be construed to confer suffrage, suffrage being a political, and not a civil, right, and that the <sup>under</sup> ~~enumeration~~ of the <sup>rights</sup> ~~rights~~ to be secured precluded the possibility of extending the meaning of the general words beyond the particulars enumerated. If his position on this point is correct, then the meaning of the general terms used in the first section of the Fourteenth Amendment could be extended since there is no enumeration of particulars in it. The first clause of the Civil Rights Bill only reiterated what was already law, he contended, and that if this was not the case, that Congress had the power, under the naturalization clause of the Constitution, to declare who were citizens. He also stated explicitly that he intended, when he voted for the second section of the Thirteenth Amendment, to give Congress the power to legislate for the purpose of securing the rights which the first section gave to the freedmen; in <sup>the</sup> words, to authorize such measures as the Civil Rights Bill. He did not think the Amendment proposed by Mr. Bingham was necessary, though he would support it in order to make things doubly secure. (41)

To show that there was a feeling among others than opponents of the bill that it might be construed to confer suffrage, Mr. Hill, of Indiana, a Republican and a supporter of the measure, proposed that the words "except the right of suffrage" be inserted. This Amendment he considered a fair and explicit statement of what the advocates of the bill had repeatedly declared in debate. He also thought it necessary in order to relieve the bill from ambiguity upon that point. (42)

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(40) McPherson, Reconstruction, PP, 21 -25.

(41) Ibid., pp. 1151 - 53.

(42) Ibid., p. 1154.



Mr. Eldridge, of Wisconsin, said that the bill not only proposed to regulate the police and municipal affairs of the States, but that it attempted to prostrate the judiciary of the States, and that it was designed to accumulate and centralize power in the Federal Government. He also cited the fact that Mr. Bingham had introduced a resolution proposing a constitutional amendment for the purpose of meeting the constitutional objections to the passage of the bill. (43) He very tersely presented the objections entertained by the minority to such legislation.

Mr. Thornton, of Illinois, a conservative Democrat, held that it was not necessary for a man to possess and enjoy all the civil rights and immunities in order to be free, and that the Amendment abolishing slavery only authorized such legislation as was necessary to make men free. He thought the former slaves <sup>should have</sup> the right to testify and to contract, but that to undertake to legislate beyond that would trench upon the rights of the States. He maintained that the construction put upon the Amendment by the advocates of the bill would make the power conferred upon Congress by it indefinite and unlimited except by the caprices of those who might assume to exercise it. If Congress should determine, he continued, that the election franchise was necessary to freedom, then it could enact a law conferring it. This contention seems perfectly proper, for if the premise of the proposition of those advocating the bill is accepted, it logically follows that Congress might declare that any or all of the political rights were either necessary or appropriate to secure freedom to the former slaves. Mr. Thornton did not think the term "Civil Rights" included the right of suffrage, but that with the loose and liberal construction then in use it might be so construed, and for that reason he thought the amendment stating specifically that suffrage should not be granted ought to be accepted. (44)

(43) Ibid., pp. 1154 - 55.

(44) Ibid., pp. 1156 - 57.





Mr. Brownall, of Pennsylvania, regarded the right of speech, of transit, of domicile, and of petition as being some of the rights and immunities of citizens. (45)

Mr. Raymond, of New York, a conservative or administration Republican, said that the negroes, if made citizens of the United States, would have the right to go from one State to the other, to bear arms, and to testify in the Federal Courts. He, however, thought the bill unconstitutional, especially the second section. (46)

Mr. Delano, of Ohio, a Republican, thought that the clause "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens" conferred the right of being jurors, though Mr. Wilson did not think so. Mr. Delano stated that he was in favor of the main purposes of the bill, but he did not think it advisable to confer upon the negroes at that time the right of being jurors. Further - more, he thought it doubtful whether Congress had the power to pass the bill, since neither the right to testify nor to inherit was necessary to freedom, as was illustrated by the various state laws declaring that certain jurors could not testify or inherit. In some states <sup>alien</sup> others could not inherit and infidels could not testify. It was also pointed out that the former law of Ohio which did not permit negroes to participate in the public schools or in the funds would have been void under this bill, (47) If the phrase "full and equal benefit of all laws and proceedings" was not an extension of the privileges enumerated, then it becomes meaningless and should not have been put in. While opposing the bill as being of doubtful constitutionality,

(45) Ibid., p. 1263.

(46) Ibid., pp. 1266 - 67

(47) Ibid., Appendix, pp. 156 - 158.



as tending towards centralization and consolidation, (45) Mr. Delano nevertheless voted for it. <sup>(48)</sup> Mr. David, of New York, was another who said that the bill was not in consonance with the Constitution, but was in derogation of the rights of the States, <sup>and</sup> yet voted for it. (49)

Mr. Kerr, of Indiana, seemed to think that the bill would permit negroes to engage in certain kind of business, such as retailing spirituous liquors, which was denied them, to attend the same schools with white children, and to rent and occupy the most prominent pews in churches. These rights as well as the right to <sup>to</sup> certify were not necessary incidents of freedman, nor did the denial of them render any one a slave. If Congress had the power to confer these privileges it could equally be claimed that it had the power to grant the suffrage. (50) The laws of Indiana at that time did not allow negroes to sell spirituous liquors or to attend the common schools.

One of the most significant speeches made on the bill was the one delivered by Mr. Bingham, one of the ablest members of Congress. He was also one of the Radical leaders and a member of the Reconstruction Committee, but his objections to the bill were of such a character that he could not support it. Like Delano, Raymond, and the other Republicans, his objections were based on constitutional grounds, but unlike Delano and some others he was unwilling to give his vote to a measure that he thought was unconstitutional.

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(48) "In my opinion, if we adopt the principle of this bill, we declare in effect that Congress has authority to go into the States and manage and legislate with regard to all the personal rights of the citizen - rights of life, liberty, and property. You render this Government no longer a Government of limited powers; you concentrate and consolidate here an extent of authority that will swallow up all or nearly all of the rights of the States with respect to the property, the liberties, and the lives of its citizens." Ibid., Appendix, p. 158.

(49) Ibid., p. 1265.

(50) Ibid., p. 1268.



Again, his position was entirely different from that of Cowan, Norton and VanWinkle in the Senate, and of Raymond, Latham, and others in the House, since he was not a Johnson Republican, but one of the extreme Radicals. He did not, however, like many Radicals, permit his partisanship to control his judgment and action when it came to a question of constitutional power. He was earnestly desirous of accomplishing the objects aimed at by the bill, but thought that it transcended the Federal Jurisdiction, since the questions about which it undertook to legislate were left by the Constitution entirely with the States. The great need of the Republic was the enforcement of the Bill of Rights (the first eight Amendments), but this could not be done by the Federal Government, he declared, since those Amendments had been uniformly held to be limitations <sup>only</sup> upon the United States. The power to punish offenses against life, liberty, or property was one of the reserved powers of the States.

Mr. Bingham also took the position that the term "civil rights" was very comprehensive and that it embraced every right that pertained to a citizen as such, including political rights. Mr. Trumbull had admitted to him that the franchise of office was a civil right according to all the authorities. He thought the evils which the bill sought to remedy should be remedied by a constitutional amendment expressly prohibiting the States from such an abuse of power, and not by an arbitrary assumption of power by Congress.

The Amendment which he had also advocated would give Congress the power, he said, to punish all violations of the Bill Rights <sup>by</sup> state officers. (51) He spoke only thirty minutes, but within that short time made one of the strongest speeches against the bill the bill - a speech full of sound reasoning and good legal arguments, but his auditors were in no mood to be governed by reason, however strongly presented or no matter what it's source.



His position on this very important bill, as well as the arguments used by him, should be kept in mind on account of the aid to be <sup>derived</sup> ~~denied~~ from them in interpreting the first section of the Fourteenth Amendment, since he was the author of that section. At a first glance one would be inclined to think that he was inconsistent in voting for the Freedmen's Bureau Bill and then opposing the Civil Rights Bill, since they were so similar, but there was this marked difference which accounts for his votes on both measures. The former bill was to apply only to the insurrectionary States and was to cease upon the restoration of those States to their constitutional relations with the Union, while the latter was to apply to all the States and was intended to be permanent.

Mr. Shellabarger, of Ohio, was among the Republicans who had doubts as to the constitutionality of the bill, though he said he had resolved his doubts in favor of the security and protection of the American citizen and would vote for the bill. (52)

Even Mr. Wilton, who had charge of the bill in the House, admitted in his opening speech that precedents, both judicial and legislative, were found in sharp conflict with its provisions. In his closing speech, he replied to the objections raised by Mr. Brigham, maintaining that state laws in regard to schools, juries, and suffrage would not be set aside by the bill if properly construed, since it only embraced those rights which belonged to citizens of the United States as such and did not attempt to regulate those rights which rightfully depended upon state laws and regulations. He denied the contention of Mr. Brigham that an amendment to the Constitution was necessary to enforce the Bill of Rights, since the possession of the rights by citizens necessarily conferred by implication the power upon Congress to provide by appropriate legislation for their protection.

If a State undertook to deprive any citizen of life, liberty, or property without due process of law, Congress had the power to provide a remedy for his





protection. (53) His position was directly the opposite of what he knew to be the ruling of the Supreme Court of the United States, since it had been repeatedly held that the Bill of Rights on the first eight Amendments were limitations upon the Federal Government and by no means limited the powers of the States. Property had been taken by the States without due process of law, and there was no remedy, said the Court in the case of Barron vs. Baltimore. His position was thus untenable, and since he stated that the purpose of the bill was to secure the rights enumerated in the Bill of Rights, it becomes clearly evident that, according to the previous rulings of the Supreme Court, the bill was unconstitutional. His speech furthermore strengthens the fact that Mr. Brigham was striving to make the rights and privileges of the early amendments applicable to the States as well as to the Federal Government. Mr. Wilson may have been given the opinion of the Judiciary Committee and of many members of Congress, but his arguments fall far short of those produced by Mr. Brigham, especially when considered from the point of view of constitutional law. In fact his arguments, as well as those of many of the adherents of the bill, were based more upon what ought to be than upon what could constitutionally and legally be, and so were more of the nature of political theory and philosophy than of constitutional law.

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(53) "I find in the Bill of Rights which the gentleman (Mr. Brigham) desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law'. I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having nothing to do with subjects submitted to the control of the several States." Ibid., p. 1294.



Mr. Lathan, a Republican Representative from West Virginia, held that Congress could not put its interpretation upon the Constitution, this being a matter belonging to the judiciary, though it could give its interpretation to its own acts. This seems perfectly true, for otherwise the eleventh Amendment would have been unnecessary, and accepting this statement it becomes apparent that Congress could not interpret the Thirteenth Amendment since it would be a question for the Courts to decide just what rights were conferred by it. Congress had the power, in fact it had already exercised it, to declare that all, regardless of color or race, should have an equal <sup>privilege</sup> to testify in the Federal Courts, an equal participation in all the rights and privileges which Congress might constitutionally regulate, but <sup>he</sup> denied that Congress had the right to interfere with the internal policy of the States so as to define and regulate the civil rights and immunities of the inhabitants thereof. — His objections were not limited to the questions of its constitutionality alone, for he considered it one of a series of measures, which, if adopted, would change the whole policy as well as the very form of our Government "by a complete centralization of all power in the National Government." (54)

We have seen that there was apprehension among Republicans, as well as among the Democrats that the term "civil rights" might be construed to confer suffrage, and in order to remove all doubt on that score, Mr. Wilson, reiterating that it did not alter his construction of the bill, added a new section by way of amendment that the bill should not be ~~so~~ construed ~~as~~ to affect the laws of any State concerning the right of suffrage. The Amendment was agreed to without division or comment. (55) Mr. Bingham had also moved that the Committee be instructed to strike out "and there shall be no discrimination in civil rights or immunities among citizens of the

(54) Ibid., pp. 1295 - 76.

(55) Ibid., p. 1162; also Blaines "Twenty Years of Congress", p. 175.



United States in any State or Territory of the United States account of race, color, or previous condition of servitude." This motion was defeated by a vote of 113 to 37. It is rather singular that not a Democrat voted to instruct the Committee to strike the above clause. The bill was then recommitteed without instructions by a vote of 82 to 70. (56)

It is worthy of notice that, although Mr. Bingham's motion was defeated, the Committee nevertheless reported back the bill with the identical changes that he had proposed or suggested. Mr. Wilson, in reporting the bill with this amendment, said it did not materially change the bill, but that some feared the deleted words might give warrant for a latitudinarian construction <sup>that</sup> not intended. If this were true, why had the proposal of Mr. Bingham been objected to so seriously? It is impossible to say just why the words were struck out, though it might be inferred that it was done in order to secure the passage of the bill, for there might have been considerable opposition to the clause which had not been expressed. Thirty-seven Republicans had moreover voted to that effect, and this of itself must have some weight. The amendment stating that suffrage was not to be regarded as a civil right or immunity ~~and~~ became unnecessary after those words were struck out. (57)

The final vote on the passage of the bill was 111 to 38. The following Republicans voted with the Democrats against the passage of the bill: Bingham, Latham, Phelps, W. H. Randall, Rousseau, and Smith. All of these, except Mr. Bingham, were from the border states of Kentucky, West Virginia and Maryland, where there was a considerable number of negroes. Mr. Bingham's objection to the bill was based entirely upon constitutional grounds. Mr. Raymond would probably have voted against the bill had he been present.

(56) Ibid., pp. 1291 and 1296.

(57) Ibid., p. 1366 - 67.



To show the view that the minority had of the bill to the last, Mr. LeBlond moved, after the bill had passed, to amend it's title by making it read: "A bill to abrogate the rights and break down the judicial system of the States."

The amendments made in the House were concurred in by the Senate without division on March 15th.

On March 27th, the President returned the bill with his objections to the Senate, where it had originated. He gave his objections ad seriatim to each section, using many of the arguments which had been urged in Congress against it, and holding that it was both unnecessary and unconstitutional, and that it discriminated between negroes and intelligent foreigners. He characterized it as a stride towards the concentration of all legislative power in the National Government. (58) His arguments were calm, clear, and temperate. The galleries and floor of the Senate Chamber were crowded

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(58) Ibid., p. 1679. Referring to the rights secured by the first section, he said "a perfect equality of the white and colored races is attempted to be fixed by Federal law in every State of the Union, over the vast field of state jurisdiction covered by the enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races. In the exercise of state policy over matters exclusively affecting the people of each State, it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto." He stated that he did not believe that the bill would annul state laws in regard to marriage, but that if Congress had the power to provide that there should be no discrimination in the matters enumerated in the bill, then it could pass a law repealing the laws of the States in regard to marriage.

He then continued: "Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. They all relate to the internal police and economy of the respective States. If it be granted that Congress can repeal all state laws, discriminating between whites and blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal, in the same way, all state laws discriminating between the two races on the subjects of suffrage and office."

Speaking of the general effect of the bill, he declared it interfered "with the municipal legislation of the States, with the relations existing exclusively between a State and it's citizens or between inhabitants of the same State - an absorption and assumption of power by the General Government which, if acquiesced in, must ~~and~~ destroy our Federal system of limited powers, and break down the barriers which preserve the rights of the States. It is another step, or rather stride towards centralization, and the concentration of all legislative powers in the National Government."





when the veto message of the President was received, but the reading of it was postponed for some time, for the case of Senator Stockton was being considered.

(59) It is rather significant that his case was not finally disposed of until it was definitely known that the Civil Rights Bill had been vetoed.

Unlike the action on the veto of the Freedmen's Bureau Bill, the veto of this bill was not taken up for <sup>discussion</sup> decision until April 4th. The cause of delay was partly the death of Senator Foote of Vermont, who died on the morning of the 28th. The Senate, out of respect, adjourned until April 2d. The veto message would, it seems, have been the regular order on that day, but there was no mention of it either on that day or the day following. While no reason was given for this delay, a careful study of the record reveals it. Time had to be given for Mr. Foote's successor to be appointed and to reach the city, for every vote was needed. It was also desirable that Mr. Stockton's successor should be on hand.

The veto was the occasion of a vigorous debate in the Senate. Mr. Trumbull made an elaborate speech, considering the veto in detail and maintaining the constitutionality and necessity of the bill. He was followed the next day by Reverdy Johnson who made an able speech in support of the veto, holding that if Congress could legislate for the black, it could <sup>do</sup> for the white, thereby destroying the reserved rights of the States. The first section of the bill, in his opinion, struck at the legislative authority of the States; the second section struck at their judicial departments and thus prostrated the States at the footstool of the Federal power. (60) Mr. Wade made a very defiant speech in opposition to the veto. --

(58 Gen.) The tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace." He stated that he was ready to co-operate with Congress in any legislation that was necessary to secure the civil rights to all persons "under equal and imperative laws, in conformity with the provisions of the Federal Constitution." Message is also in McPherson's Reconstruction, p. 74.

(59) Ibid., p. 1679, also McPherson's Scrap Book, "The Civil Rights Bill", p. 28.

(60) Ibid., p. 1761.



During the debate an unusual incident showed the temper which had been engendered in the Senate by the veto and the debate on it. Late in the evening of April 5th, Mr. Trumbull intimated his purpose or willingness to have the veto taken if there was no further debate. Mr. Cowan suggested that an hour be agreed upon to take the vote the next day, since two Senators, Messrs. Wright and Dixon, were very sick and could not with safety come out at night. Messrs. Guthrie, Hendricks, and others strongly insisted upon the point of courtesy. Mr. Wade spoke very bitterly in reply, saying that he was thankful that God had stricken a member so that he could not be present to sustain the veto. (61) Mr. McDougall rebuked him with deserving severity. The Senate adjourned, however, by a vote of 33 to 12, thus failing to sustain Mr. Wade's angry position. (62)

Mr. Davis reiterated his objections to the bill, claiming that the distinctions or discriminations made between negroes and whites on steamboats, in railway cars, in hotels and in churches, would be swept aside by the bill. (63) Messrs. Doollittle, Sanbury, and McDougall also spoke in support of the veto.

The bill passed the Senate, notwithstanding the objections of the President, by the necessary two-thirds vote, on April 6th, 1866. The final vote was 33 to 14. (64)

Mr. Wright, of New Jersey, who had been sick for sometime was brought into the Senate chamber for the purpose of sustaining the veto. Mr. Dixon, of Connecticut, the only Senator not voting, was also sick, but would have been brought in had it been seen that his vote would sustain the veto. Mr. Stockton's place had not yet been filled, though strenuous efforts had been made by Thaddeus Stevens and others to have this done, for there was fear

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(61) "I will tell the President and everybody else that if God Almighty has stricken one member so that he cannot be here to <sup>approve</sup> the dictation of a despot, I thank him for his interposition and I will take advantage of it if I can." Globe p. 1736.

(62) Ibid., p. 1736

(63) Ibid., Appendix, p. 183.

(64) Ibid., p. 1807.



Mr. Edmund<sup>son</sup>, who had been appointed to fill the vacancy created by the death of Mr. Foote, took his seat April 5th, the day before the vote was taken. The fear on the part of the Republicans that the veto might be sustained made them resort to every possible means to obtain their end. Mr. Stockton, who had been duly elected Senator from New Jersey, but against whose election certain members of the New Jersey Legislature had protested, was not<sup>147</sup> elected for rejection. His credentials had been passed upon by the Judiciary Committee, of which Mr. Trumbull was Chairman, and his election declared to be legal.

11 The Committee had made their report January 30th, Mr. Clark, of New Hampshire, being the only member of the committee who ~~did~~ not approve the report. No action whatever had been taken upon the report and there is little probability that Mr. Stockton's right to his seat would ever have been called in question had the Republican majority been sufficient without unseating him, for otherwise the delay in regard to his case cannot be accounted for. When it was seen that the Civil Rights Bill was in great jeopardy, and that the Radical plan of reconstruction would consequently be endangered, it was decided to get rid of Stockton. So on March 22d, his case was brought before the Senate. This was four days after the Civil Rights Bill had been placed in the hands of the President. Many Radicals voted to permit Mr. Stockton to keep his seat, and had his colleague, Mr. Wright, been present he would have retained <sup>it</sup> his seat. Mr. Wright had <sup>been</sup> ~~farred~~ with Mr. Morrill, of Maine, on the question before ~~he~~ left the city, but the latter, after giving Mr. Stockton notice that he considered the <sup>business</sup> ~~case~~ at an end, voted. To show, however, that he had compunctions about it, he did not vote when his name was first called, but after the roll call had been completed, and seeing



it within his power to decide the question, pressure having been brought to bear by Sumner and others, he voted. The final vote by which Mr. Stockton was unseated was taken on March 27th, after the veto message of the bill had been received, but before it was read. Strenuous efforts were made to postpone final action until Mr. Wright could get to the city, but these efforts were futile. This is but another incident to show the determination of the Radicals to carry their measure even at the sacrifice of right and justice.

No debate was permitted in the House, the bill passing that body on the 9th of April by a vote of 122 to 41. The following Republicans, Noel, Raymond and Whaley, in addition to those who voted with the minority before, voted to sustain the veto.

Mr. Colfax, the Speaker, requested the Clerk to call his name, his vote being greeted with applause. His announcement that the bill, the objections of the President to the contrary notwithstanding, had become a law was received with great applause, both by members of the House and the throng in the galleries, the hisses of a few sorrowful soldiers being unnoticed in the general joy. (65)

He may conclude, then, that many of the ablest men in Congress, including strong men in the Republican party like Doolittle, Cowan, Raymond, and Bingham, thought that Congress was going beyond its power in passing the Civil Rights Bill. All those who opposed the bill, not only took the position that it was unconstitutional, but most of them thought it unwise and inexpedient. Even many of those who supported it admitted that it undertook to regulate affairs that had uniformly been regarded as belonging exclusively to the States. While not regarding the bill as conferring the right of suffrage, or as interfering with the state laws as to the inter-marriage of the races, though many strong legal minds thought it would have that result, it cannot be questioned but that it conferred, or proposed to confer, upon the freedmen rights which would





greatly interfere with state legislation. Many believe that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear <sup>that</sup> all of these contentions were specifically contradicted. It would seem reasonable to suppose that if the bill should prove to be constitutional that these rights could <sup>not</sup> be legally denied them.

Having seen what Congress thought of the bill, it might be well to see <sup>what</sup> that the people thought of it - what rights and privileges they regarded as being conferred by it. As is to be expected, we find the press of the country divided on it, largely along political lines, just as was the case in Congress. The Southern press was naturally hostile to the legislation. The Southern mind had long been taught to regard the Federal Government as one of the very limited powers, and any legislation which tended to increase that power at the expense of the states, could obviously be condemned. Consequently we find the Southern press denouncing the bill as infringing the rights of the States and centralizing all or very near all power in the Central Government. (66) Furthermore, the South was the section which would be affected by it and that section would never consent to any legislation that tended towards equality with the negroes.

Many papers at the North took a similar view, among them being the World, the Herald, <sup>and</sup> the Times, and others; The Cincinnati Commercial also threw the weight of its editorial column upon this side. All of these except the World were Republican papers, while the New York News was a strong Democratic paper. The press, even more than members of Congress, gave a broad and liberal meaning to the bill, saying that under cover of



"full and equal rights" state laws forbidding amalgamation would be set aside, that negroes could not be kept out of theaters, churches, etc. (67) The Cincinnati Commercial, a conservative Republican paper, thought that the bill was unconstitutional, in that it would open the schools, hotels, churches, theaters, <sup>+</sup>concert-halls, ~~etc.~~, to negroes on the same terms with white people, and that it would be a crime to refuse them these rights. (68)

This was also the opinion of the National Intelligence of Washington, the so-called Administration organ.

The Tribune, of which Greeley was the editor, was a strong supporter of the measured policies of the Radical, but had very little to say about the Civil Rights Bill further than that it was a just measure and should be adopted. It never denied the contention of <sup>many</sup> ~~may~~ that it would curtail the rights of the States. The New York Evening Post, a Republican paper, advocated the bill, apparently thinking that it would guarantee free speech and free press, which in its opinion <sup>were</sup> ~~was~~ badly needed in the South.

The right to hold office and to serve on the jury <sup>was</sup> ~~was~~ not considered as among the rights secured by the bill, (69), but the right to peaceably assemble, to petition, to have freedom of movement, to have impartial protection of life, person and property were. (70) It was also held that the right to keep fire-arms should be secured to the negroes on the same terms as <sup>to</sup> ~~the~~ whites. (71)

It was declared by a strong opponent of the bill that every argument in its favor savored of centralization, and that the President had properly characterized it when he said it was a great stride towards consolidation.

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(67) N. Y. Herald, March 29th, 1866.

(68) March 30th, 1866.

(69) N. Y. Post, March 28th, 1866.

(70) Ibid., March 30th and April 3d, 1866.

(71) Ibid., April 7th, 1866.



State laws against miscegenation would be made void by it, the ministers or magistrates refusing to marry those of different races being made subject to fine and imprisonment. If the bill became law the State Government would practically be abolished; if Congress could confer civil rights, it could <sup>with</sup> ~~would~~ equal propriety confer political rights, since to do either required an invasion of the province of the States. (72)

The statement that miscegenation would not only be possible under the bill, but that state laws against it would be nullified, may seem rather extreme, though we have already seen that this view was taken by some, while the bill was before Congress. If these statements <sup>had been</sup> ~~were~~ limited to opponents of the bill and to partisan newspapers, we might discard it at once as preposterous. There are, however, facts of greater weight than these mere statements. A negro preacher married a white man and a negro woman in the State of Tennessee, for which he was fined \$500.00, while the parties to the marriage contract were imprisoned, being unable to pay the fine of \$50.00, which was imposed on each of them. The Tribune, after recounting this, expressed the desire that the case be brought before the Supreme Court of the United States for adjudication under the Civil Rights Bill. (73) A case somewhat similar to this, and said to be the first case of it's kind in Mississippi, occurred at Jackson in June 1866. The parties were tried, found guilty, and sentenced to the county jail for six months, with fine of \$500.00 each. The military officers looked on, but offered no interference. (74) The Civil Rights Bill was probably the basis <sup>of</sup> ~~of~~ both of these incidents.

(72) World, March 28th, 1866.

(73) N. Y. Times, July 16th, 1866, under caption: "Amalgamation in Tennessee."

(74) Garner, Reconstruction in Mississippi, p. 114.



While the World and the Tribune represented the extreme<sup>^</sup> opposite poles, the many references to this particular question are sufficient to show that many thought it possible that state laws prohibiting amalgamation might be held void under the Civil Rights Bill. But there is no doubt but that the great majority of the people did not think that such would be the result of the measure.

One writer declared that Senator Trumbull's speech on the veto of the bill affirmed a principle "pregnant with danger to the rightful authority and jurisdiction of the States", and therefore as justifying the position taken by the President. "Instead of overthrowing the vital objection urged in the veto message", this writer declared, "Mr. Trumbull in reality conceded all that it involves," since he neither denies nor shows that the bill does not include and cover subjects in regard to which the States have<sup>^</sup> up to that time exclusively legislated. (75)

In the Cincinnati Commercial, it was argued that the bill was more deserving of<sup>^</sup> veto than the Freedmen's Bureau Bill, since it was an attempt to take from the States the rights reserved to them by the Constitution to enact and enforce their own police regulations. Congress did not have the power to declare state laws null and void, this being a question for the Courts to determine. (76) Such legislation as the Civil Rights and Freedmen's Bureau Bills was declared to be revolutionarily in its character from the fact that it took from the local authorities and legislators matters that had uniformly been referred to them. (77)

The bill was regarded as<sup>^</sup> the death blow<sup>to</sup> the States in that the state judiciary would practically be abolished by it, since the state courts could only act under powers granted by the Federal Government. It was also asserted that the measure carried Federal interference into privacies into which even the most local laws never entered, for the customs of a community were made

(75) Editorial in Times, April 7th, 1866.

(76) March 27th, 1866.

(77) Ibid., March 29th, 1866.





amenable to Federal authority - an authority entirely foreign to the community. At a public sale of church pews, it was declared negroes could not be prevented from purchasing, while a white man could if he were objectionable to the church or the customs of the church, since such refusal would not be made on account of color. The same would be true it was urged in regard to hotels and other places of accommodation, for if a negro was refused admittance, the proprietor would be subject to both fine and imprisonment, while a white man could only recover civil damages however wrongfully he might have been refused accommodations. (78)

A mass meeting of the citizens of Carroll County at Westminster, Maryland, May 19th, 1866, adopted a series of resolutions, one of which was a declaration that the Civil Rights Bill was unconstitutional, and that if carried into effect would upheave the foundations of social order. These resolutions were sanctioned both by the Republicans and Democrats. (79)

The belief that the bill conferred upon the negroes the right of attending churches and theaters was not limited to the so-called loyal States, for this opinion was also held in the South, and the desire was expressed that, if it was to be enforced in this respect, it be first enforced in Boston.

"What that city has so effectually sowed," it was declared, "let it reap!"

(80) The view was also held in the South that the Civil Rights Bill not only infringed, but that it destroyed, the rights of the States by concentrating all power in the Central Government, by making the State Judiciary amenable and subservient to Federal authority, and by conferring upon Congress powers unknown to the original law of the country. (81) A view of the bill not generally taken by the Southern press was that taken by the Mobile Register. This journal did not think that the bill would interfere with the regulations

(78) National Intelligence, March 24th, 1866.

(79) N. Y. Herald, May 26th, 1866.

(80) Atlanta Intelligence, May 3d, 1866.

(81) Charleston Courier, April 2d, 1866.



and of steamboats, railroads, street cars, theaters, or other places of public resort. (82)

It is apparent, from this examination that many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the states, and as a step towards centralization, in that it interfered with the regulation of local affairs which had hitherto been regulated by state and local authorities or by custom. The opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provision of the Bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

The bill enumerated certain specific rights such as the right to testify, to sue, be sued, etc., but it was generally felt that more than these enumerated rights were conferred, and that under it's provisions, negroes could not be kept out of the jury-box, and that they were to have equal rights with the whites in every respect, even to the right of intermarriage. The right of intermarriage, however, was not so generally held to be conferred by the bill, but the other opinions, it seems, were clearly warranted, both by the context of the bill and by the declarations of some of it's supporters.

(82) Quoted in Cincinnati Commercial, April 21st, 1866. The Memphis Argus practically held the same opinion, stating that it consolidated all power in the hands of Congress. The Cincinnati Commercial of April 21st, quoted the Argus on this point, but did not deny it's interpretation of the bill, merely saying that a part of the bill was similar to the fugitive slave law.

*in the Cincinnati Commercial, April 21st*



What the papers gave as their opinion must necessarily have been the opinion of large numbers of the people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made <sup>to</sup> by the negroes to secure their rights.

About two weeks after the bill had been passed Congress, two so-called freedmen, in order to see whether the bill had really benefited them in a practical way, as a train was about to leave Washington for New York, went to a sleeper and demanded accommodations. The demand was refused them at the request of the other passengers, (all said to be New Englanders), who threatened to leave the car if the negroes were admitted. The negroes thereupon threatened prosecution under the Civil Rights Bill and took their departure. (33) Two or three incidents occurred in Baltimore <sup>an</sup> earlier date. A negro asserted the right to ride in a railway car on the York Road among the other passengers, and when compelled to go to the front platform where colored persons were allowed to ride, noted the number of the car, probably to bring suit, and departed. On the same night, another negro, James Williams, appeared at the ticket office of the Holliday Street Theater, and asked for a ticket, which was of course refused. The next night another negro went to a public house and asked for a drink, and on the refusal of the proprietor to sell him the liquor, went away to file complaint at the station, claiming that "as a citizen he was entitled to the same privileges as white men." (34) Before the middle of May the Baltimore & Ohio Railroad Company had a suit pending against it for refusing to sell a negro a first class ticket. It was also stated that several suits

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(33) Cincinnati Commercial, April 30th, 1866.

(34) National Intelligencer, April 24th, 1866, also Baltimore American, April 16th, 1866.



had been brought in Baltimore and other parts of the country against persons refusing to admit negroes to entertainments from which they were at that time excluded by state or municipal laws. (85) The editor of the National Intelligencer, commenting upon these facts observed that if the bill was constitutional it would be difficult to see how negroes could be debarred, except at the risk of a suit, from going into hotels, theaters, restaurants, billiard rooms, or any licensed house where men have a legal right to accommodations. Towards the last of April the negroes of New York began to "feel their civil rights" - four or five going into a fashionable restaurant, sitting down among white ladies and gentlemen, and appealing to the Civil Rights Bill to protect them from ejectment. (36) The editor reporting on this incident said the same game would probably be tried at the churches, theaters, and other resorts, but that after some annoyance and inconvenience, the negroes would be quietly regulated by public opinion. It was also stated (37) that the negroes of Boston proposed to contest the power of theater managers, Church wardens, etc., to exclude them from mingling with the whites in an "equality" of position. They evidently carried out their intentions, but were excluded from the theaters, since only a nominal fine was imposed by the law which had been passed on that subject. (38)

There were several occurrences in the North and West where negroes claimed the right to attend places of amusement to the discomfiture of white ladies. The editor added that the South would have to endure the same thing, though not responsible for it. (39) The first suit under the Civil Rights Bill was in Indiana, and in this case the bill was held constitutional.

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(85) Ibid., May 13th, 1866.

(36) N. Y. Herald, April 23th, 1866.

(37) Atlanta Intelligencer, April 18th, 1866.

(38) Cincinnati Commercial - May 24, 1866.

(39) Atlanta Intelligencer, April 26th, 1866.





This was the case of Barnes vs. Browning. Barnes, a negro, sued Browning, a hotel proprietor for wages, and the plea offered by Browning was that Barnes was not entitled to sue in the courts of Indiana, since he had come into the State contrary to the Constitution of the State. There was a provision in the Indiana Constitution which prohibited negro immigration and declared null and void any contracts made with such persons. There was also a law to enforce this provision which was to the effect that no negro coming into the State could make or enforce contracts.

Barnes demurred to the answer of the defendant maintaining that the Indiana law and Constitution in that respect were void, because: 1. ~~Contrary~~ to the spirit and letter of the Constitution of the United States; 2. In conflict with the 13th Amendment, 3. Void under the first section of the Civil Rights Bill. The lower court sustained the demurrer, and the case was brought before Judge Test of the Circuit Court by way of appeal. He sustained the decision of the lower court, though basing his decision on the 13th Amendment, since the Civil Rights Bill had not been officially promulgated. (90) The suit was no doubt inspired by the passage of the bill, for it was instituted April 11th, only two days after its passage and reference being made to it in reply to the plea set up by the defendant.

This decision was rendered at LaFayette, Indiana, April 14th, 1866, just five days after the passage of the bill by Congress. Another case very similar to this one, was decided by the Supreme Court of Indiana at its May term. Smith, a negro, sued Moody to collect a promissory note. The same plea was set up in this case as in the other, the lower court deciding in favor of Moody. The Supreme Court, however, reversed this decision, holding that the Civil Rights Bill had nullified the provision of the Indiana Constitution prohibiting negroes from coming into the State or making contracts.

(91) This was probably the first decision of the highest court in any State

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(90) McPherson's Scrap-book, "The Civil Rights Bill", pp. 91 - 92, also the Chicago Republican, April 17th, 1866.

(91) 26 Indiana Reports, p. 299.



in which the Civil Rights Bill was involved.

Probably the second case in which the measure was brought before the Courts, was at Annapolis, Maryland. Here on April 17th, a negro was introduced as a witness. The State's Attorney was greatly surprised at this, saying that there was no authority for it, but it was claimed that the Civil Rights Bill had given it. (92) Soon after the Fourteenth Amendment had been submitted to the States, the Chief Justice of the Court of Appeals of Maryland held that the Civil Rights Bill was constitutional. On June 22d, one Somers assaulted a negro and was brought before a Justice of the Peace. His counsel held that the negro could not testify, but the Justice held that the State law had been abrogated by the Civil Rights Bill. In default of Bond, Somers was put in jail. Effort was made to secure writ of habeas corpus, but Judge Bowie upheld the decision of the Justice, saying that the bill was constitutional in regard to the right to testify. Since the other provisions of the bill were not involved, he did not undertake to say whether they were constitutional or not. (93) More than a month before this Judge Thomas, of the Circuit Court of Virginia, in a case before him at Alexandria, declared that the Civil Rights Bill was unconstitutional and that negro evidence could not be admitted, since the state law forbade it in civil cases in which white men alone were parties. In his opinion <sup>Congress</sup> ~~lawyers~~ did not have the power to impair the right of the States to decide what classes of persons were competent to testify in their Courts. (94)

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(92) Baltimore American, April 20th, 1866.

(93) Baltimore American and N. Y. Times, July 7th, 1866. <sup>(94)</sup> Annual Cyclo-  
pedia 1866, p. 765. Also Ackende, Political.

(94) Reconstruction in Virginia, p. 50



The <sup>only</sup> case which we have found where the constitutionality of the bill was decided in the Federal courts is that of the United States vs. Rhodes, decided by Justice Swayne, of the Supreme Court, sitting as a Circuit Justice. In May 1st, 1866, the home of Nancy Talbot, a negress, was entered by white men named Rhodes for the purpose of robbery. She was not allowed to testify against them in the Kentucky Courts. The Federal Court had jurisdiction under the Civil Rights Bill.

Justice Swayne said the bill was remedial and should be liberally construed; that the Thirteenth Amendment was the first amendment which trenchd upon the power of the States, the other limiting the power of the Federal Government; that the Congress succeeding <sup>one</sup> ~~they~~ <sup>was</sup> ~~are~~ which proposed that Amendment had passed the bill, many of the members being the same, and that this fact was not "without weight and significance." The bill was declared to be constitutional in all it's provisions. (95)

A negro was indicted in Memphis, Tennessee, for keeping a tippling house and billiard room contrary to state law. His attorneys claimed that the state <sup>law</sup> ~~was~~ annulled by the Civil Rights Bill, but the State's Attorney declared that he would not obey or observe that bill, since it was unconstitutional. (96) The Criminal Court of the city, however, sustained the contention of the defendant that the state law ~~was~~ null and void because in conflict with the Civil Rights Bill. An appeal was taken to the Supreme Court of the State. (97)

Judge Gilpin, Chief Justice of Delaware, held that the Civil Rights Bill was void and inoperative in so far as it assumed to regulate the rules of evidence, etc., of state courts. This decision was rendered in November, 1867, though prior to this <sup>he</sup> ~~he~~ seems to have accepted that part of the bill

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(95) Abbott (U.S.) 28, and 27, Federal Cases, 735.

(96) Baltimore American, April 21st, 1866. (From Memphis Argus)

(97) McPherson's Scrap-book, "The Civil Rights Bill", pp. 119-120.



which provided that a different punishment could not be inflicted on account of color, without, however, passing on the constitutionality of the bill. It may be proper to add that he was a Republican. (98)

Several arrests were made for refusing to <sup>receive</sup> negro testimony. Five magistrates of the Corporation Court of Norfolk were arrested for this, the United States Commissioner holding that they had violated the Civil Rights Bill and binding them over for trial at the May term (1867) of the District Court. (99) Judge Thomas, who refused to receive negro testimony at Alexandria, was arrested and taken to Richmond, where he was released on his own recognizance in the sum of \$1000.00 to appear at the November term of the Court. (100) Judge Magruder, of Maryland, was several times arrested for a similar offence. John Hopwood, a Justice of the Peace, of the same State, was also arrested.

The Maryland Legislature passed a law to reimburse any magistrate or judge for costs and fines to which they were liable for rendering decision adverse to the Civil Rights Bill. It was stated in the bill that this was done for the purpose of making the judiciary free - to enable the judicial officers to render decisions according to their <sup>own</sup> views of the law. (101) Judge Abell, of Louisiana, was arrested July 1866, being charged with having "wickedly, wilfully, and with malice aforethought" declared the Civil Rights Bill unconstitutional. The decision for which he was arrested, was made May <sup>9th</sup>, 1866. In this decision he declared that it aimed to strike down the independence of the States, to <sup>destroy</sup> ~~rap~~ the foundation of Republican Government, to override the laws of the States, and to obliterate every trace of the independence of the state judiciary. (102)

Chief Justice Hardy of Alabama declared that the bill was unconstitut-

(98) Ibid., p. 149.

(99) Ibid., p. 134.

(100) Ibid., p. 136.

(101) Ibid., pp. 110, 122, 134, 135.

(102) Ibid., pp. 112, 118.





ional, confirming the sentence of the lower court which had convicted a negro for carrying fire-arms contrary to state law. (103) Judge Harberson of Kentucky held the bill unconstitutional, as did also the city judge of Louisville, in the same State. The former declared that the right to testify was not essential to freedom as was shown by the action of the free States in denying that right to free negroes for eighty years in cases where whites were involved. He, therefore, decided that the bill was not "appropriate legislation" under the Thirteenth Amendment, and that if it was, it could not apply to those who were free before the Amendment was ratified. (104) This was practically the position taken by Judge Krocket, of the United States District Court, January 29th, 1867, for he held that the Civil Rights Bill was intended to protect negroes who had been slaves, and did <sup>not</sup> include white persons at all. (105) It was stated that the bill had been held unconstitutional in Nevada, but no reference to the case was given. (106)

A negro in Gilmer County, West Virginia, sued the clerk of the county court for refusing to sell a license for his marriage with a white woman. It was stated that this would bring the Civil Rights Bill before the Courts. (107) Judge Walton, of Augusta, Maine, imposed a fine of \$40.00 and thirty days imprisonment on a negro and a white woman for having married in violation of the state law. The punishment was so slight because the parties were ignorant of the law. Their counsel made the plea that the Civil Rights Bill allowed them to marry, but the judge was unable to see it that way, saying that the bill could not alter the laws of the State, and that the marriage was null and void. The writer reporting this incident stated that some of the Radicals were exasperated from the fact that a radical judge had renounced and set at naught

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- (103) Ibid., p. 120  
 (104) Ibid., pp. 113, 115  
 (105) Ibid., p. 134  
 (106) Ibid., p. 115.  
 (107) Ibid., p. 115.



a law of the United States which gave the negro the same rights that were enjoyed by white men. (108).

Under the caption "Negroes Getting their Civil Rights", an account was given of a negro and white woman before the court in Nashville. The woman was slightly fined and sent to the work house, while the negro was sent to the Freedmen's Court. (109)

In addition to the <sup>instances</sup> ~~violences~~ we have already given in which the Civil Rights Bill was held to be constitutional, there are several others, but in most of these cases the question at issue was as to the right to testify. As early as June 1866, the Orphan's Court for Baltimore decided that negroes could testify under the Civil Rights Bill. (110) The same provision of the bill was held to be valid by Judge French of Washington County, Maryland. He followed the decision of Judge Bowie rather than that of Judge Magruder. (111) Judge Durrell, of the United States District Court for Louisiana, held the bill to be constitutional. (112)

The Civil Court of Detroit, Michigan, decided, September, 1866, that negroes could not be prevented from enjoying any privilege they chose and could pay for. The case before the court was brought by a negro for the refusal of the doorkeeper to admit him and his companions to the main body of the theater - they being directed to the gallery. The judge in this case was said to be a Democrat. (113) The United States Commissioner, at Mobile, Alabama, decided June 26th, 1867, that the railway company of that city could not prevent negroes from riding in the same cars with white persons, since to do so was in violation of the law, evidently referring to the Civil Rights Bill, for the counsel for the negro asked that the President of the company be

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- (108) Ibid., p. 136.  
 (109) Ibid., p. 113.  
 (110) Ibid., p. 113.  
 (111) Ibid., p. 132.  
 (112) Ibid., p. 115.  
 (113) Ibid., p. 120.



bound over to the Federal Court under that bill, which was done. (114)

Major Horton of the same city, an appointee of the military authorities, banished a negro boy from the city, this not being possible in regard to white people. He was indicted, tried, and found guilty for violation of the Civil Right Bill. There was much rejoicing that the "trap made to catch the Southerners had ~~just~~<sup>just</sup> gobbled up a Yankee official." (115)

Among the incidents to show the view generally taken of the bill, two negro women of Portsmouth, Virginia, tried to enter the cabin on a ferry-boat intended for ladies. (116) A similar incident occurred in Baltimore as to a waiting room set apart for ladies at one of the depots. (117) Suits were instituted in both cases under the Civil Rights Bill.

There were other incidents, more or less similar to those we have given, in which attempts were made by negroes to enjoy the same privileges accorded to white persons. There were doubtless a number of similar incidents which did not receive public notice, as well as many which we have not observed.

The instances we have cited, however, are apparently sufficient to justify the conclusion that the belief prevailed generally - North, East, West, and South - especially among the negroes, that the Civil Rights Bill gave the colored people the same rights and privileges as regards travel, schools, theaters, churches, and the ordinary rights which may be legally demanded. There also seems to have been a less general belief that it also permitted the inter-marriage of the races. Many of these cases occurred before the Fourteenth Amendment passed Congress, some of them having been decided by the Courts. Reference was also made to some of them in the debates, and weight must be given them in interpreting the purposes of the Amendment, since it was acknowledged that the first section of the Amendment was the Civil Rights Bill incorporated into the Constitution. This somewhat extended account of the bill, therefore,

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(114) Ibid., p. 136.

(115) Ibid., p. 181.

(116) N. Y. Tribune, May 18th and 21st, 1867.

(117) McPherson's Scrap-book, "The Civil Rights Bill", p. 109.



and the cases arising under it, had<sup>be</sup> been given for the purpose of aiding us in the interpretation of that Amendment, and this will become more apparent in the chapters that are to follow.





## Chapter II.

### THE FOURTEENTH AMENDMENT BEFORE CONGRESS.

The consideration of the Amendment itself will take us back in point of time, for it was not presented as a whole at first, but by sections, nor were these sections finally acted upon by both Houses until after the Civil Rights Bill had been disposed of, having been side-tracked to give full sway to that important measure. There may also have been other considerations which caused the postponement of the various amendments; for example, to let the Reconstruction Committee formulate and present its entire plan of reconstruction, to give it time to secure all the evidence it could to aid in the enactment of that plan, or to postpone final action until after the spring elections in some of the New England States, so that the Republican interests might not be affected by the plan of reconstruction proposed.

The Amendment was not a spontaneous creation, was not the product of one mind, but of many. It was also a product of evolution, and its growth and development made an interesting study. In considering this evolution of the Fourteenth Amendment, it seems advisable to consider each section separately in order to render the connection and meaning more clear and apparent. This <sup>was</sup> ~~was~~ necessitated a certain amount of repetition, but we trust that the object aimed at, clearness, will justify this course.

The first section is by far the most important section of the Amendment, for it is the only one which has played any very noticeable part in our country's history or has had any influence whatever upon our customs or legislation. This section also underwent more changes than any of the others before receiving the form in which it now stands in the Constitution. Of the various forms in which it was presented the same purpose and spirit were observable. It is about this section also that there has been so much contention as to its meaning and object.



Probably the interpretation most generally given and most readily accepted is that its principal and <sup>al-</sup>most only purpose was to define citizenship; that it was to make federal citizenship primary, a citizen of the United States becoming by residence therein, ipso facto, a citizen of one of the States. The Courts have practically given this interpretation to it, declaring that it was to make citizens of the freedmen. A careful examination of the proceedings of Congress should show whether or not this was the principal object originally aimed at.

On the second day of <sup>the</sup> session, December 5th, 1866, Mr. Stevens, the Republican leader in the House, introduced a joint resolution proposing an Amendment to the Constitution of the United States. It was in the following form: "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." The next day, Mr. Bingham of Ohio introduced a resolution to accomplish the same object, though the forms of the two resolutions were quite different. The resolution introduced by Mr. Bingham was reported back by him from the Reconstruction Committee, February 13th, 1866, in the following form: "Article -----. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." (1) This was practically the form in which it had been introduced December 6th.

Mr. Bingham, its author, in bringing this resolution before the House, February 26th, made known his reason for proposing it as an amendment.

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(1) Globe, 39th Cong., 1st Sess., pp. 14 and 813.



He stated that it had been the <sup>desire</sup> ~~want~~ of the Republic that there was no express grant of power in the Constitution to enable Congress ~~to~~ to enforce the requirements of the Constitution, and cited the fact that the contemporaneous construction, the continued construction, legislative, executive, and judicial, had been and was that the provisions of the immortal Bill of Rights embodied in the Constitution rested for their <sup>execution</sup> ~~extension~~ and enforcement upon the fidelity of the States. (2) In this brief statement he revealed the nature and purpose of the Amendment. It meant nothing less than the conferring upon Congress the power to enforce, in every State of the union, the Bill of Rights, as found in the first eight Amendments. If his purpose should succeed, it meant that Congress, and not the Legislatures of the States, would be empowered to legislate concerning all the subjects embraced in the Bill of Rights, thus increasing the power of the Central Government at the expense of the States.

A decided opposition to the resolution was manifested when it came up for debate the next day. Mr. Kelly, of Pennsylvania, declared that the power which the Amendment proposed to confer was already in the Constitution, but that it had lain dormant. He was, therefore, in favor of submitting it to the States. The debate was of a general and uninteresting nature with the exception of the speech by Mr. Hale of New York, who declared that the tenor and effect of the resolution was to bring about a more radical change in the system of government and to institute a wider departure from the theory upon which it was founded than had ever been proposed in any legislative or constitutional assembly. "I submit," he continued, "that it is in effect a provision under which all state legislation, in its codes, and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of



Congress established instead." <sup>in H<sup>o</sup></sup> He took the position that however desirable it might be that there should be reforms in state laws, such reforms should be made by the States. He also ~~opposed~~ the Amendment on the ground that its language was too vague and general, that, at a single stride, it put almost unlimited power in the hands of Congress, and that the words "necessary and proper" had already been given a liberal construction by the Courts. (3)

Mr. Davis, also of New York, continued the debate the following day in opposition to the resolution. He thought that the Amendment, if <sup>amended at</sup> adopted, would not only centralize <sup>power</sup> power in the Federal Government and that that power was "intended to be exercised in the establishment of perfect political equality between the colored and the white race of the South." The Amendment he asserted, was a grant of power to Congress to ~~ex~~<sup>act</sup> original legislation in regard to life, liberty, and property, and that Congress was to be the judge as to what was necessary legislation, and concluded; "Under such a power the constitutional functions of state legislatures are impaired, and Congress may arrogate those powers of legislation which are the peculiar ~~manumissions~~ of state organization, and which cannot be taken from the States without a radical and fatal change in their relations.

"I will, sir, <sup>do not</sup> consent to no centralization of power in Congress in derogation of constitutional limitations, nor will I lodge there today any grant of power which may in other times, and under the control of unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of my countrymen." (4)

Messrs. Hale and Davis were Republicans, both had voted for the Freedmen's Bureau Bill and both voted for the Civil Rights Bill at a later date, and their objections to the proposed Amendment were, therefore, not partisan.





Mr. Woodbridge made a short speech in support of the resolution, stating that its purpose was to enable Congress to secure, by legislation, the privileges and immunities guaranteed to every citizen under the constitution. In his opinion this or a similar Amendment was both necessary and proper. (5)

Mr. Bingham, the author of the resolution, followed with a somewhat elaborate speech in defense of the resolution. He denied the suggestion that had been made that its purpose was to amend the Constitution. Its only purpose was, he declared, to empower Congress to enforce the Bill of Rights. He cited the decision of the Federal Supreme Court in the case of Barron vs. <sup>the</sup> Mayor and City Council of Baltimore to show that the Bill of Rights was not applicable to or binding upon the States. He referred to a speech by Mr. Webster to show that the Bill of Rights was, however, to be enforced and observed by the States, but since this had not been done in many States it was essential that an amendment should be adopted giving Congress the power to enforce it. (6)

Mr. Conkling stated that he had opposed the measure while it was before the Committee. Mr. Hotchkiss thought it too conservative, saying that it left the rights of the citizens entirely in the hands of Congress<sup>es</sup>, and that a future Congress might, therefore, make laws which would not be agreeable. He wanted the Constitution so amended as to deprive the States of the power to discriminate against any class of citizens, and advocated the postponement of the resolution. Mr. Conkling, with the *quasi* consent of Mr. Bingham, moved the postponement of the resolution until the

(5) Ibid., p. 1096.

(6) Ibid., pp. 1088 - 1094.



second Tuesday of April, though he voted for the postponement for an entirely different reason than did Mr. Hotchkiss, declaring that it could not be objected to as not being sufficiently radical. His motion was agreed to by a vote of 110 to 57 - Mr. Bingham voting in the affirmative. (7)

It is rather difficult to determine the cause of the postponement. Mr. Bingham may have seen that it was impossible to secure its adoption at the time in view of the hostile criticism of it by members of his own party, though it was suggested that the postponement was due to the fact that elections were soon to take place in New Hampshire and Connecticut, and that it was feared that the measure might be so radical as to affect the interests of the party in power. (8) The resolution was not called up in April, nor indeed was it again brought before the House in the same form.

While the resolution was not debated in the Senate, it is worthy of note that Senator Stewart, of Nevada, referred to it, February 28th, saying that it would change our form of government if adopted, and that little legislation would be left for the States. (9)

It may be interesting at this point to show the attitude of the Reconstruction Committee (10) in regard to the proposed amendment. At the

(7) Ibid., pp. 1094 - 1095.

(8) N. Y. Herald, March 28, 1866.

(9) Ibid., p. 1082. *See, p. 1082*

(10) The Reconstruction Committee (for the Committee of Fifteen) consisted of the following: Senators: Messrs. Fessenden (Chairman), Howard, Harris, Williams, ~~Gins~~ and Johnson.  
Representatives: Messrs. Stevens (Chairman on part of House), Conkling, Eastwell, Blow, Bingham, Morrill, Washburne, Grider, and Rogers. Messrs. Johnson, Grider, and Rogers were Democrats.

*Grimes*



third meeting of the Committee, January 12th, 1866, the day after Mr. <sup>Thurman</sup> ~~Turnbull~~ had introduced the Freedmen's Bureau and Civil Rights Bill, Mr. Bingham submitted the following resolution proposing an amendment to the constitution: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property." At the same time he moved its reference to a sub-committee consisting of Messrs. Fessenden, Stevens, Howard, Conkling, and Bingham. (11) This sub-committee, composed entirely of Republicans, to which the various propositions in regard to the apportionment of Representatives were also to be referred, reported back the resolution at the fifth meeting of the Committee, January 20th, in the following form: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property." (12) It will be observed that this resolution was in much stronger terms than the one submitted by Mr. Bingham, for <sup>it</sup> ~~this~~ one declared that all citizens should be given the same political rights and privileges, thereby conferring, or making it possible for Congress to confer, the elective franchise and the right to hold office upon the negro. Since no record of the proceedings of this sub-committee was kept, we can only conjecture as to how its members voted on the above resolution. From his subsequent action, we may feel safe, however, in saying that Mr. Conkling opposed the whole measure, though he never betrayed or made known the real motives which actuated the committee. This sub-committee was doubtless appointed to formulate and consider partisan measures, since no Democrat was placed upon it, thus enabling the Radicals to discuss freely their purposes and the best means or methods of obtaining them without any <sup>danger</sup> ~~change~~ <sup>revelation</sup> of resolution.

(11) Journal of the Reconstruction Committee, p. 7.

(12) Ibid., p. 9.



The resolution, as reported back by the sub-committee, was not considered, however, by the full Committee until its next meeting, January 24th. At this time Mr. Howard moved to amend the resolution by inserting "and elective" after the word "political", but this seemed unnecessary no doubt, and was rejected, only two, Messrs. Howard and Rogers, voting for it, the latter no doubt to make it as obnoxious as possible.

Mr. Boutwell then moved the following as a substitute for the first clause of the resolution: "Congress shall have the power to abolish any distinction in the exercise of the elective franchise in any State which by law, regulation, or usage may exist therein." This was also rejected, and, indeed, it is difficult to see where his substitute would secure more than was secured by the words "political rights and privileges." The resolution was again referred to a select committee composed of Messrs. Bingham, Boutwell, and Rogers. (13)

At the next meeting, three days later, Mr. Bingham reported the resolution in this form: "Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, the same immunities and also equal political rights and privileges." Mr. Johnson moved to strike out the last clause, but his motion was lost by a vote of 4 to 6, five being absent. (14) The resolution was not considered at the meeting January 31st, but on February 3d, Mr. Bingham moved, by way of amendment, the following as a substitute: "The Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each <sup>state</sup> all privileges and immunities of citizens in the several States (Art. IV, Sec. 2); and to all persons in the

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(13) Ibid., p. 12.

(14) Ibid., p. 12.





several States equal protection in the rights of life, liberty and property (5th Amendment)." After a discussion of the question, a vote was taken on the substitute, with the following result: Yeas, Messrs. Howard, Williams, Washburne, Morrill, Bingham, Boutwell, and Rogers, (7); Nays, Messrs. Fessenden, Grimes, Harris, Stevens, Grider, and Conkling (4). Messrs. Johnson and Blow were absent. The question then recurred on agreeing to the proposed Amendment as amended, and on this question there were nine in the affirmative and four in the negative, the four negative votes being cast by Messrs. Harris, Grider, Conkling and Rogers, while Messrs. Johnson and Blow were not present. (15)

When the Committee met again, a week later, Mr. Stevens moved that the Amendment or resolution, as amended February 2d, be reported to Congress. The vote on this motion was the same as that by which the resolution was adopted at the previous meeting with the exception that Mr. Johnson was present and voted in the negative, while Mr. Blow voted in the affirmative, Mr. Washburne being absent. (16) It is to be noted that only two Republicans, Messrs. Harris and Conkling, both of New York, were opposed to the resolution. As we have already seen, the resolution was brought before the House February 13th, but was postponed on February 28th. As to the reason or reasons for the opposition of Messrs. Harris and Conkling, there is no record.

It would be assuming too much to attempt to say why so many changes were made in the resolution, but it seems that one is warranted in asserting that the resolution as finally agreed upon February 14th, <sup>3, and inserted in the House Feb. 15,</sup> was so worded as not to give Congress power over the elective franchise, or political rights in general, or at least not to have it expressed so badly as Messrs. Howard, Boutwell, and others wanted it. With the exception of the probably intended

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(15) Ibid., p. 14.

(16) Ibid., p. 15.



exclusion of political rights, the various forms in which the resolution was brought before the Committee breathed the same spirit and purpose, the only object or purpose in making the changes being to get it into the best possible form to accomplish the desired end or ends. It may also be well to note the fact that on one occasion Mr. Bingham indicated in parentheses the sources of his resolution, since ~~this~~ may aid in a later consideration of the Amendment. It is to be regretted that no record of the discussion which took place in the Committee was kept, for such a record would be very valuable in ascertaining the purposes of the various resolutions, though of course the statements or declarations of the members of the Committee in the debates which took place in Congress will, in part at least, supply this want.

It is especially important to note the fact that there was no suggestion of a clause declaring who were citizens of the United States, and that two classes of persons were recognized in all the resolutions. To the one class, citizens, was to be secured the privileges and immunities, whether specifically stated to include political rights or not, of citizens of the United States. It is perfectly evident, from the limited debate which was had on the resolution in the House, that the term "citizens" was intended to include the freedmen, they being regarded as citizens since the abolition of slavery. To the other class, designated as "persons", was to be secured equal protection in the rights of life, liberty, and property. "Persons" included, of course, all citizens as well as those who were not citizens, this being a broader term. This same distinction was made in the first section of the Fourteenth Amendment as finally ratified.

There seems to be little doubt, as shown by its form and the debates, as to the main purpose or effect of the resolution which was postponed on the 28th of February, for it declares in unmistakable terms, "Congress shall have power." Had it been a part of our Constitution, even a Supreme Court, composed entirely of strict constructionists of the old



ré<sup>g</sup>ime, could hardly have found any pretext for limiting the power of Congress to enact any legislation which it deemed "necessary and proper" to secure the privileges and immunities of citizens, even to the extent of defining these privileges. It would have conferred upon Congress positive, and not merely corrective, legislative power as was claimed by some, and while "Political rights" were finally omitted, it seems possible that Congress could, under the broad power given by the general terms used, properly have determined the qualifications of electors, and fixed other political rights.

The legislation of the States would have been subject to the will of Congress, for there would have been created a centralized Government, with nearly all power in the Legislative Department.

It was undoubtedly the intention of Mr. Bingham and the members of the Committee who supported him, to give Congress power to act when the States had passed laws which violated the principles stated in the resolution. From the declaration of Messrs. Hale and Davis when the resolution was before the House, and especially from the context of the resolution itself, it seems that we may properly infer that they intended to confer what is still more important, the power to take the initiative in legislation and laws passed, which were not in the strict sense corrective. Congress, and not the Courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States. The believers in State Rights may well feel grateful that the resolution was not incorporated into the fundamental law of our country, though it may properly be asked whether it really did not become a part of it with a mere change in dress, but not in meaning.

It is nearly two months after the postponement of the resolution, February 26th, before we hear of any resolution, either in Congress or before the Committee, that is at all similar to the one postponed. During this time the Civil Rights Bill had been passed, had been vetoed, and had been declared law, notwithstanding the President's objections. Mr. Bingham and



others, as we have seen, opposed that bill as being without warrant in the Constitution, stating that the resolution which had been postponed was intended to authorize such legislation.

It could not be expected that a man of the ability, determination, and zeal of <sup>Mr.</sup> Bingham would easily succumb to defeat. With his measure apparently under the ban, he set to work with a stronger determination to overcome the obstacles in his path. He exercised all the ingenuity of his legal and astute mind to put his cherished scheme into such form as to secure its adoption by making it acceptable to <sup>his</sup> colleagues. He did not make it weaker, as he himself stated at a subsequent time, but stronger, though it was in a form that seemed less objectionable.

It was not until the meeting of the Committee, April 21st, that Mr. Bingham again brought forward his resolutions. It was at this meeting that the first sign of the composite character of the Fourteenth Amendment was presented. Mr. Stevens submitted a plan, which, he stated, had been framed by some else, but which received his approval. This was ~~then~~ <sup>Mr.</sup> plan of Robert Dale Owen, as will be shown later, and consisted of five sections. Prior to this time the various propositions as to the privileges and immunities of citizens, the basis of representation, the rebel debt, etc., had been submitted as separate and distinct Amendments. But now for the first time is revealed the intention of the leaders to combine all the propositions into one Amendment.

Section one of the plan submitted by <sup>Mr.</sup> Stevens read as follows: "No discrimination shall be made by any State, ~~not~~ by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Mr. Bingham at once moved to amend this section by adding: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without compensation." This amendment was discussed, Mr. Bingham no doubt explaining





its purpose, but it was rejected by a vote of 7 to 5, receiving the votes of Messrs.

Johnson, Stevens, Bingham, Blow and Rogers. The section as submitted by Mr. Stevens was then adopted with only two votes, those of Messrs. Gridler and Rogers, in the negative. After sections 2, 3, and 4 had been adopted, Mr. Bingham moved to insert the following as section 5: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The Journal of the Committee states that this proposition was discussed, and adopted by vote of 10 to 2, <sup>Mr. B.</sup> Gridler and Rogers again being the only members who voted in the negative, while Messrs. Fessenden, Harris, and Conkling were absent. (17) At the meeting of April 25th, Mr. Williams, who had voted for the section proposed by Mr. Bingham, April 21st, moved <sup>to</sup> ~~it~~ strike it out. After some discussion this was done by a vote of 7 to 5, those voting to retain it being Messrs. Stevens, Morrill, Bingham, Rogers and Blow; Messrs. Fessenden, Grimes, and Washburne were either absent or did not vote. A motion was then made to report the resolution or plan as amended, to both Houses. This prevailed by a vote of 7 to 6. On this motion Messrs. Conkling, Boutwell, and Blow voted with the Democrats against reporting it. Undaunted by successive <sup>his favorite scheme</sup> defeats, Mr. Bingham at once brought forward ~~the child of his heart~~, proposing it as a separate amendment, but again, after discussion, it was rejected, receiving only the votes of the Democrats in addition to his own. It is rather difficult to account for the votes of the Democrats at this time unless it was for the purpose of disgusting the people with so many amendments, <sup>or</sup> to cause division within the ranks of the majority, thereby hoping to defeat



all amendments. A motion to reconsider the order to report the proposed plan to Congress was **carried**, Messrs. Stevens and Howard being the only ones who objected to this. (18) The vote was reconsidered on account of the absence of the Chairman, Mr. Fessenden, who had the ~~very~~<sup>very</sup> cold, (19) since it might not be considered very respectful to him to report the final plan of reconstruction in his absence. Who knows what effect this delay had on the final form of the Amendment? The plan submitted by Robert Dale Owen, through Mr. Stevens, might have become a part of the Constitution instead of the present Fourteenth Amendment, though this is rather doubtful.

At the meeting three days later, Mr. Bingham again brought his oft-rejected measure before the Committee by moving to strike out section 1 of the proposed plan and to insert his favorite measure in its place. It was again discussed, and was finally accepted by a vote of 10 to 3, Messrs. Grimes, Howard, and Morrill voting against it. Mr. Conkling for the first time gave his ~~consent~~<sup>assent</sup> to it. Messrs. Fessenden and Harris did not vote. (20) It would be both interesting and valuable if we only knew what was said in regard to this measure, which had so often been rejected. Whether the Committee was worn over to Bingham's view by his arguments or persistence, we do not know, but we may imagine the satisfaction which Mr. Bingham must have experienced at having his measure finally accepted by a large majority of his colleagues on the Committee. It was this same proposition, with the addition of the clause defining citizenship, which in the identical form in which he introduced it before the Committee, April 21st, finally passed

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(18) Ibid., pp. 31 - 32.

(19) Atlantic Monthly, June 1875, p. 660. See also Wilson, The Rise and Fall of the Slave Power in America, <sup>4</sup>p. 650.

(20) Journal of the Reconstruction Committee, p. 35.



Congress, June 13th, and was eventually ratified by the States as section 1 of the Fourteenth Amendment. The whole plan or proposed Amendment was then ordered to be reported to Congress, the vote being strictly partisan, 12 to 3. (21)

We have thus traced the changes, in the form of section 1, which were made in the Committee of Fifteen; No reasons were given for these various changes, but it may be asserted, we think, that the main object in view was the same throughout, the only difficulty being as to frame or word the section as to accomplish that object and yet secure the Amendment's adoption. The Radical leaders were as aware as any one of the attachment of a great majority of the people to the doctrine of States Rights - not the right of secession to be sure, but the right of the States to regulate their own internal affairs, including the question of suffrage. The form in which the measure was first brought before the Committee, and afterwards introduced in the House, was too bald, <sup>and</sup> it was seen that some change was necessary. This was the problem that Mr. Bingham set himself to solve, and there seems little, if any doubt, but that he kept the same object in view, and thought that the section, as finally reported and adopted, was as strong as the first one, and intended it to accomplish the same purpose, to remedy the same evils, and to confer the same powers upon Congress. His subsequent declarations and actions ~~only~~ confirm this view. (22) As the author of the proposition, his testimony should be given much weight, and he was furthermore one of the best, if not the best, constitutional lawyer in the House of the Thirty-ninth Congress. A man of strong conviction, strongly attached to his party, Mr. Bingham was, however, guided in his actions by his convictions, as was illustrated by his vote on the Civil Rights Bill. Strong Radical that he was, nothing but a sincere and deep conviction on his part would have induced him to vote against a party measure.

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(21) Ibid., p. 38.

(22) See the fourth chapter.



The original Constitution was framed under very difficult and trying circumstances. The Fathers were very careful so to word it as to confer great power and yet to have it in such a form as that the people might not fully realize the power that was being conferred, for otherwise it is doubtful whether it could have been adopted. We are venturing little, we believe, in saying that this was apparently the problem that confronted the Radical leaders of the Thirty-ninth Congress, and that their main purpose in proposing the first section of the Amendment was to increase the power of the Federal Government very much, but to do it in such a way that the people would not understand the great changes intended to be wrought in the fundamental law of the land. <sup>if</sup> ~~if~~ they failed in this, ~~it~~ is not so much their fault, but is due entirely to the construction put upon their work by the Supreme Court.

The authorship of the Fourteenth Amendment has been ascribed to, or claimed by, some two or three men. In June 1805, on the death of Judge Stephen Neal, of Indiana, the statement was made in the leading papers of the country that he was its author. The Indianapolis News went so far as to give a picture of the room in which he wrote it. The only evidence to support the claim made by Judge Neal is a letter from Mr. Orth, who was a member of Congress at the time, to Judge Neal stating that he had submitted the plan sent him by the Judge to the Committee, and that it had been adopted by the Committee almost verbatim. It was stated that this letter was lithographed and presented by Judge Neal. The Journal of the Reconstruction Committee shows that a plan was submitted by Mr. Stevens, but this plan consisted of five sections, and not of four, as Judge Neal stated his did. Furthermore, there is strong evidence that another man from Indiana, Robert Dale Owen, was the author of the plan submitted by Mr. Stevens on April 21st. Mr. Owen, in an article in the Atlantic Monthly for June 1875, under caption of "Political





Results from the Varioloid", gives a copy of the plan which he submitted to Mr. Stevens. This copy is identical, word for word, with the plan submitted by Mr. Stevens, as given in the Journal of the Committee. Since the Journal was not published for several years and was kept by Mr. Fessenden, the Chairman of the Committee, and by his heirs, it would hardly have been possible for Mr. Owen to have given the proposed Amendment had he not really been the author of it. Mr. Owen's plan was also published in the newspapers at the time, and it was stated that it was being considered by the Committee. This seems sufficient to show that Judge Neal's claim to the authorship of the Amendment falls to the ground, for no other plan similar to the one submitted by Mr. Stevens on April 21st, was brought before the Committee, the other propositions being separate and distinct Amendments. No doubt Judge Neal sent a plan to Congressman Orth, and Mr. Orth may have given it to a member of the Committee, but it seems perfectly evident that it was not submitted to the Committee as a whole or acted upon by it. It may have been very similar to the plan agreed upon, thus leading Mr. Orth to infer that it was Judge Neal's plan that had been accepted.

Mr. Owen never claimed that the Amendment as finally adopted was his, though unquestionably the plan was his. But for such a plan we would not have had such a heterogeneous Amendment as the Fourteenth. The same or similar sections might have been proposed separately, but had this been done, there is little doubt but that some of them at least would have been rejected either by Congress or by the States. Mr. Owen's plan had been accepted and ordered to be reported to Congress without any changes whatever. And this would have been done but for the illness of Fessenden. The delay was fatal to Owen's plan, scarcely any vestige of the original form being retained. He states in the Article to which we have referred, that Stevens gave the reason for the changes, especially that in regard to suffrage. The action of the



Committee leaked out, and caucuses were held by the members from New York, Illinois, and Indiana. Each of these decided against negro suffrage in any shape.

The statement was made several times during the campaign of 1866 that Mr. Pingham was the author of the Amendment. This was true only as regards the first section.

We desire especially to call attention to the fact that at no time was the question of citizenship considered by the Committee, no proposition to define citizenship being submitted. This fact alone, it seems, is sufficient to show that the principal object of the Amendment was not to declare who were citizens, for the Committee evidently regarded the freedmen as citizens, since the purpose of the whole reconstruction measure was more or less bound up with that class. This conclusion, reached after a careful examination of the Journal of the Reconstruction Committee, is re-enforced by the report of the majority of that committee, for it is stated specifically in that report that negroes were no longer slaves, but free men and citizens. This being the view of the Committee, how can it reasonably be maintained that the first section had for its principal object the conferring of the status of citizenship <sup>upon</sup> negroes?

Before tracing the course of the Amendment in the House and the Senate, it may be well to consider the report of the Committee, for it should be a valuable source in aiding us to determine or to discover the reasons given for proposing the Amendment. The report was drawn up by Mr. Fessenden and is an able document. Senator Grimes, a member of the Committee, in a letter to his wife at the time, June 11th, 1866, stated that he regarded it as the ablest paper, either as a report or in the form of a speech, that had been submitted to Congress during his membership of the Senate. (27)

After declaring that, instead of being mere chattels, the former slaves had become free men and citizens; that they had been true and loyal to the Union,



and that it would be the basest ingratitude to abandon them to their former masters without securing them in their rights as free men and citizens, the report says: "Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your Committee that adequate security could only be found in appropriate constitutional provisions." (24)

The Committee then cites incidents and testimony to show the condition of the South, saying that the southern people haughtily demanded, as a right, the privilege of participating in the government which they had been striving to overthrow; that the leaders were prominently put forward to fill the highest places, many of them, including A. H. Stephens, the Vice-President of the Confederacy, being elected to Congress in face of the test-oath; that the whole conduct of the people displayed a feeling of hostility to the Federal Government; that there was "no general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality"; that Union men were detested and Northern men going South were proscribed; and that to have fought against the Union was considered a virtue. With such an array of evidence as this, the Committee was of opinion that "Congress would not be justified in admitting such *Communities* to a participation in the government of the country without first providing such constitutional or other guarantees as will tend to secure the civil rights of all citizens of the republic."

The closing paragraphs of the report are worthy of being quoted in full, for they express briefly, but cogently, the objects which the Committee desired to accomplish by the amendment.

"The conclusion of your Committee, therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation,

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(24) Reports of Committees of House, 39th Cong., 1st Sess., vol. II, p. XIII.



adequate security<sup>t</sup> for future peace and safety should be required; that this can only be found in such changes of the original law as shall determine the civil rights of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce these provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to.

"Before closing this report, your committee beg leave to state that the specific recommendations submitted by them are the result of <sup>Mutual</sup> ~~untrue~~ concession, after a long and careful comparison of conflicting opinions. Upon a question of such magnitude, infinitely important as it is to the future of the republic, it was not to be expected that all should think alike. Sensible of the imperfections of the scheme, your Committee submit it to Congress as the best they could agree upon, in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom; and, that when finally adopted, it may tend to restore peace and harmony to the whole country, and to place our republican institutions on a more stable foundation."

(25)

All the Republican members, except Messrs. Blow and Washburne, signed this report, which was submitted to Congress June 8, 1860. It is important to note that not a word was said about the necessity or desirability of defining citizenship, and that it was specifically declared that negroes were citizens, although the report was submitted ten days after Mr. Howard had proposed to amend the first section by adding a clause declaring who were citizens, and over a week after that amendment had been accepted by the Senate. This





seems to be almost conclusive evidence that the question of citizenship was not regarded as the most important object of the first section of the Amendment.

The report of the minority of the committee, written by Reverdy Johnson, and signed by him and the other two minority members, was made June 20th. This report was confined principally to a legal discussion of the status of the Southern States and their rights under the Constitution. ~~The~~ report declared that no further demands should be made as a condition precedent to the admission of Representatives from those States, but that there was no objection to the fourth section of the proposed Amendment. Objection was also made to <sup>the</sup> manner in which the Amendment was submitted, maintaining that the different sections should have been submitted as separate articles so that the people might accept or reject such <sup>as</sup> as they saw fit without accepting or rejecting all.

The resolution proposing an Amendment to the Constitution was reported to both Houses of Congress April 30th, in the form finally agreed upon April 23th. Mr. Stevens introduced it in the House and Mr. Fessenden in the Senate, and both of them introduced at the same time the bills which were to accompany it. One of these bills was in regard to admitting the Southern States to a participation in the <sup>f</sup>government or adopting the proposed Amendment, while the other one declared certain persons ineligible to hold office under the Federal Government.

The resolution was not considered, however, by the House until May 3, when Mr. Stevens opened the debate. He stated that it was not all that the Committee desired, but that after a careful survey of the whole ground, it was decided that a more stringent proposition could not be ratified by



nineteen States, three-fourths of the so-called loyal States, repudiating the idea that it should be submitted to the Southern States or "disorganized communities" as the Committee characterized them. The report of the Committee also stated that the proposition was not all that they desired, and Mr. Grimes (27), in a letter to his wife, April 30, stated the same thing. These references, however, relate more particularly to the second section, for many were in favor of securing negro suffrage.

In reference to the first section, Mr. Stevens stated that all of its provisions were asserted either in the Declaration of Independence or in the Constitution, and added: "But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all." He evidently had reference to the Bill of Rights, for it is in it that most of the privileges are enumerated, and besides it was not applicable to the States. Under his construction, moreover, Congress would only have power to interfere in case of discrimination by the States, but even then Congress would judge as to whether there was discrimination or not, and could, therefore, exercise great power. To the answer that the same things were secured by the Civil Rights Bill, Mr. Stevens replied that that was partly true, but that a law was repealable by a majority, and that it should be put beyond the power of Congress to repeal it. (28)

The debate was limited to thirty minutes to each speaker, and it was said to have been the intention of the leader to call the previous question the day the resolution was introduced, April 30. It was predicted, however, that had this been done the previous question would not have been seconded. (29)

(28) Globe, 39th Cong., 1st Sess., p. 2450

(29) Ibid., p. 2437 and N.Y. Herald, May 1, 1866.



Mr. Finck, of Ohio, followed Mr. Stevens by declaring that if the first section was necessary to confer power upon Congress to legislate about the matters contained in it, the Civil Rights Bill was clearly unconstitutional. (30) From this declaration it is apparent that he thought the effect of the section would be to authorize legislation similar to the Civil Rights Bill. It would also follow that he must have thought that this would not only empower Congress to act in case the States enacted discriminating laws, but that Congress might also enact laws, similar to the Civil Rights Bill, declaring what privileges should be secured to all.

Mr. Garfield denied the position taken by Mr. Finck that those who voted for this section thereby acknowledged the unconstitutionality of the Civil Rights Bill, maintaining, as did Mr. Stevens, that it was to put that bill beyond the possibility of repeal by Congress. (31) His view was, therefore, that the first section merely incorporated the Civil Rights Bill in the Constitution.

Mr. Thayer, of Pennsylvania, held the same views in this regard as did Messrs. Garfield and Stevens, but also stated<sup>32</sup> that it was putting into the Constitution what was already in the Bill of Rights of every State in the Union. (32) According to this last statement, it would empower Congress to legislate about the subjects contained in those Bills of Rights, especially in cases where Congress declared that the State laws were not equal. Since the Bill of Rights of the States was similar to that of the United States, it may properly be inferred that he thought the section would empower Congress to enforce the first eight Amendments in the States. Mr. Thayer evidently thought the first section of the Amendment was as effective and as strong as the proposition submitted by Mr. Bingham in February, for in a speech on the Civil Rights Bill, March 2, he declared that he would

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(30) Globe, 39th Cong., 1st Sess., p. 2461.

(31) Ibid., p. 2462.

(32) Ibid., p. 2465.



support Mr. Bingham's proposition which proposed to put the same protection in the Constitution that was to be secured by the bill. He practically made the same statement in regard to the first section in his speech, May 1.

The view taken of the first section by the first three speakers, all Republicans, was likewise held by Mr. Boyer, of Pennsylvania, a Democrat. He thought it did more than put the Civil Rights Bill into the Constitution, and that it was intended to secure ultimately, and to some extent indirectly, the political equality of the negroes. It was also objectionable, in his opinion, in that it was ambiguous and admitted of conflicting constructions. (37)

Messrs. Kelley and Schenck, followed Mr. Boyer, but their speeches were confined to the general policy of Reconstruction, with especial reference to the third section.

Mr. Brodhead, of Pennsylvania, the next day, May 2, declared that the object of the first section was "to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction." He evidently thought that Congress would be empowered to pass laws protecting citizens of the United States, and in order to do this, it would be necessary for Congress to determine what were the privileges and immunities to be protected. He also stated that it was the Civil Rights Bill in another shape, but that it was desirable to have it in the constitution to make assurance doubly sure, since some thought the bill unconstitutional, among the number being Mr. Bingham. (34)

Mr. Brodhead was followed by a Democrat, Mr. Franklin, of Kentucky, who said that <sup>the</sup> purpose of the first section was to destroy the rights which the framers of the Constitution declared to belong exclusively to the States and to invest (vest?) all power in the General Government. (35) By a liberal

(37) Ibid., p. 2487.

(34) Ibid., p. 2496.

(35) Ibid., p. 2500.





construction of the section his statement was no doubt warranted.

Mr. Raymond, a conservative or Johnson Republican, had voted against the Civil Rights Bill because he thought it unconstitutional, but now supported the Amendment. He stated that the first section had been first embodied in the Amendment proposed by Mr. Bingham giving Congress power to secure an absolute equality of civil rights in every State of the Union, and that it had then come before Congress in the form of the Civil Rights Bill. He furthermore stated that it was the purpose of this section to confer upon Congress the power to pass the Civil Rights Bill and that he would, therefore, support it. (36) It is significant that Mr. Raymond stated that the object of this section was the same as the resolution submitted by Mr. Bingham in February, especially since he had opposed the Civil Rights Bill.

Mr. Eldridge, a Democrat, said that the incorporation of the first section in the proposed Amendment was an admission that the Civil Rights Bill was unconstitutional, (37) evidently thinking that its purpose was to authorize such bills as that one. We have already noted the answer that was given by Messrs. Garfield and Stevens to a similar statement.

Mr. Eliot, of Massachusetts, supported the Amendment because he thought the doctrines contained in it were right, saying that, if Congress, did not have the power to prohibit discriminating legislation on the part of the States, such power should be distinctly conferred. He had voted for the Civil Rights Bill, he continued, thinking that Congress had ample power to enact the provisions of that bill, but declared his willingness to incorporate into the Constitution provisions which would remove the doubts entertained by some on that question. (38)

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(36) Ibid., p. 2502.

(37) Ibid., p. 2506.

(38) Ibid., p. 2511.



On the third and last day of the debate in the House on the resolution, Mr. Randall, of Pennsylvania, one of the leading Democrats of the House, and ~~who afterwards~~ <sup>who</sup> was several times Speaker of the House, asserted that the first section proposed "to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has hitherto been exclusively exercised by the States." He also seemed to think that the section would confer power upon the Federal Government to interfere in behalf of every character of rights save suffrage, and that even the privilege of determining who could vote in the States would ~~soon~~ <sup>soon</sup> be by assured. (7)

Mr. Rogers, a minority member of the Reconstruction Committee, closed the debate for the Democrats, and his speech is of sufficient importance to justify a somewhat extended quotation. His speech <sup>is</sup>, in part, as follows:

"Now, sir, I have examined these propositions with some minuteness, and I have come to the conclusion different to what some others have come, that the first section of this programme of ~~discrimination~~ <sup>un</sup> is the most dangerous to liberty. It ~~wipes~~ <sup>un</sup> the foundation of the Government: it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and ~~great~~ during the long period of its existence."

Mr. Rogers characterized the proposal as an "attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights Bill" which was vetoed because it was an attempt to consolidate the power of the States. He also declared that the term "privileges and immunities" embraced every right which anyone had under the laws of the

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(39) Ibid., p. 2532.



country, including the right to vote, to marry, in contrast, to be a juror and to hold office; and added: "I hold it that even becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileged and immunities." He stated that if a negro was refused the right to be a juror, that the Federal Government would step in and interfere. (40) This last statement has been fulfilled.

Mr. Rogers was in a position to speak with some knowledge and authority as to the character and purpose of the section, for he had heard the discussions in the Committee in regard to it, though he could not divulge anything that was said there on account of the order of secrecy which was made binding on all the members of the Committee. He did not say that it was one of the purposes of the Amendment to make the Bill of Rights applicable to the States, but his declarations were of such a nature as to render this unnecessary, having said that it would concentrate all power in the hands of the Federal Government.

Mr. Farnsworth, of Illinois said that <sup>all</sup> of the first section except the last clause was already in the Constitution. That was true, but he evidently overlooked the fact that the Fifth Amendment was not binding upon the States, for he regarded the first two clauses of the section as ~~more sufficient~~ <sup>Amplified</sup>. (41)

Mr. Bingham, the author of the first section, said that the necessity of that section was one of the lessons taught by the war, and that there had been a want hitherto in the Constitution which it would supply. That want he declared to be "The power in the people, the whole people of the United States,

(40) Ibid., p. 2573.

(41) Ibid., p. 2579.



by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."

He denied that this section conferred power upon Congress to regulate suffrage in the several States, and in answer to a suggestion made elsewhere that if it did not confer this power the need of it, 'was not perceived,' declared: "To all such I beg leave again to say, that many instances of state injustice and oppression have already occurred in the state legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the National Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, '<sup>penal</sup> ~~civil~~ and unusual punishments' have been inflicted under state laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." This quotation makes it perfectly evident that he intended to confer power upon the Federal Government, by the first section of the Amendment, to enforce the Federal Bill of Rights in the States, for the citation he made from the Constitution is to be found in the Eighth Amendment. If the section under consideration had this effect as to that Amendment, it necessarily follows that it would apply equally to the other seven Amendments. A comparison of these statements with those he made in February while his original resolution was before the House, clearly demonstrates that the two resolutions, in his mind at least, were identical, and that the first section of the Amendment conferred the same powers that he intended to confer by the original resolution.





It is to be inferred from what he said at this time that Congress was only to interfere in cases where some of the privileges or immunities were abridged or denied by the unconstitutional acts of the States. This seems to be confirmed by another statement made in the same speech, where he declared that the "great want of the citizen and stranger, protection by national law from unconstitutional state enactments," (42) would be supplied by this section. While these statements might seem to justify the conclusion that Congress was not empowered to act until the States had actually passed discriminatory or unconstitutional laws, Mr. Bingham evidently did not intend to leave that impression, for he stated specifically at this time that no State ever had the power, by law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges of any citizen, though stating that this had been done, and that without remedy. It can be inferred properly, we think, that he meant by this that no State could abridge, or could allow to be abridged or denied, any of the privileges of citizens. Besides, he had stated on a former occasion, while the resolution was still before the Committee, that the Constitution declared that no person should be deprived of life without due process of law, but that notwithstanding this, life had never "been protected, and is not now protected, in any State of this union by the statute law of the United States." (43) This clearly shows that he intended that Congress should have the power to pass laws declaring what rights should be secured to the citizens. Anyway, it matters little whether Congress was to exercise the power before the States had denied those privileges, either by acts of omission or *of* commission, since Congress was unquestionably empowered to define or declare, by law, that rights and privileges should be secured to all citizens.

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(42) Ibid., pp. 2542 - 43.

(43) Ibid., p. 422.



Mr. Stevens then closed the debate with a short speech, after which the previous question was ordered. The vote was ~~then~~ taken immediately after Mr. Bingham had spoken, and his position must have been understood by all the members present. His statement of the need and purpose of the section must, therefore, have been acquiesced in by those who supported it, especially since Mr. Bingham was the author of it as well as a member of the Committee which ordered it to be reported, and thus could speak with authority. Furthermore, his statements do not at all contradict the position taken by Mr. Rogers and others of the minority, but rather strengthen it. In fact, there seems to be little, if any, difference between the interpretation put <sup>upon</sup> ~~given~~ the first section by the majority and by the minority, for nearly all said that it was but an incorporation of the Civil Rights Bill. It might be expected that the minority would ascribe certain motives to it on partisan grounds, but this does not seem to have been the case in regard to this particular section, for there was no controversy or misunderstanding as to its purpose and meaning. The minority opposed it because they objected to increasing the power of the Federal Government, while the majority supported it for this very reason.

We may safely say, in conclusion, that the House believed and intended that the purpose and effect of the first section of the Fourteenth Amendment would be to give Congress the power to enact affirmative legislation, especially where state laws were unequal, and that it would also make the first eight Amendments binding upon the States as well as upon the Federal Government, Congress being empowered to see that they were enforced in the States. It also seems proper to say that Congress would be authorized to pass any law which it might declare "appropriate and necessary" to secure to citizens their privileges and immunities, together with the power to declare what were these privileges and immunities. This Congress might nullify state laws which prohibited negroes from serving on the jury, which denied them the



right to travel on steamboats and railway cars, to go to school, to attend theaters, etc., on account of race or color. It was charged by certain of the minority speakers that such was the purpose, and would be the result of it, and this was not denied by the majority, though it might have been regarded as unnecessary. It is evident that, if Congress was given the power to declare what were the privileges and immunities which no State could deny, and it seems that this was intended to be the case, since they are nowhere clearly stated, either in law or the Constitution, Congress might properly pass a bill similar to the Civil Rights Bill of 1875, declaring that all should be admitted on equal terms to hotels, theaters, schools, churches, railway cars, etc.

Many Republicans wanted the previous question voted down to give an opportunity for amendments, though amendment was only desired as to the third section, the first section being acceptable to all. <sup>For this</sup> Who advocated the Amendment? By a rather strange construction of the extremists of both sides, the previous question was ordered by a vote of 94 to 79, thus preventing all amendments. (44) The Democrats who voted with the extreme Radicals to prevent an opportunity of amending the resolution, did so no doubt to make the Amendment as objectionable as possible in order to secure its defeat either by the Senate or by the States, but their party tactics were of no avail.

The proposed Amendment was then passed, May 12, 1866, in the form in which it was reported, by a vote of 123 to 37, only five Republicans, all from the border States of Maryland, West Virginia, and Kentucky, voting in the negative. The announcement of the vote was received with applause on the floor and in the galleries. Mr. Raymond's vote for the measure was also C

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(44) A newspaper reporter, describing the vote on ordering the previous question, said: "Thad, confident of his strength, sat in his seat, grinning sardonically and chatting with the crowd of his abiding friends gathered about him." Herald May 11, 1866.



applauded. (45) Of the Republicans who voted against the Amendment, none had expressed any objection to the first section except Mr. Phelps of Maryland, though he and Mr. Smith of Kentucky were the only ones who spoke on the question.

We have already observed that Messrs. Bingham and Raymond, who had opposed the Civil Rights Bill, supported the Amendment, and it is probably worth while to point out that Messrs. Hale, Davis, and Conkling, all of New York, supported the Amendment, though they had opposed it in another form at an earlier date. Their apparent inconsistency may be explained by saying that the first section did not attempt to confer as much power as did the resolution which they opposed, but this explanation is very much weakened when it is recalled that they must have heard what Messrs. Rogers and Bingham had said in regard to it, and without any statement whatever as to what they understood it to mean, they voted for it. Mr. Conkling also must have been aware of what Mr. Bingham intended to accomplish by it, for he was present in the Committee when it was submitted, and had always opposed it there. He had stated his objections to such a plan early in the session, declaring that it would <sup>touch</sup> ~~be~~ upon the principle of local sovereignty by denying "to the people of the several States the right to regulate their own affairs in their own way." (46) The plan of which he was speaking included both civil and political rights, but the principle was the same.

Probably one of the most important things to be noted, however, is the fact that the Amendment, in the form in which it passed the House May 10, 1866, contained no clause defining citizenship. If the main purpose

(45) Globe, 39th Cong., 1st Sess., p. 2645. A reporter stated that Mr. Eldridge wanted the speaker to stop the applause, but that "Jack Rogers hoped the colored brethren and sisters in the galleries would be allowed to wave their pocket handkerchiefs." Herald, May 11.

(46) Ibid., p. 358.





of the first section was to declare who were citizens, why was it not raised in <sup>the House</sup> the question of citizenship does not appear to have been raised during the 'three days' debate on the Amendment, it evidently being taken for granted that negroes were citizens. In fact, the Civil Rights Bill had declared them citizens, and that part of the Bill seems to have been acquiesced in, for it was apparently recognized by all that the negroes were henceforward to be citizens of the United States. It cannot, then, be maintained, so far as the House is concerned, that the question of citizenship was at all involved.

The joint resolution proposing the Fourteenth Amendment had been introduced in the Senate April 20, the day on which it was brought before the House, but no action was taken in regard to it until nearly two weeks after its passage by the House. Mr. Fessenden, the Chairman of the Reconstruction Committee, and consequently the one to take charge of it in the Senate, was too ill to open the debate. This duty was assigned to his colleague on the Committee, Senator Howard, of Michigan, who opened May 23.

In beginning his speech, Mr. Howard said that he proposed to present, in a succinct form, the views and motives which influenced the Committee to propose the Amendment, so far as he understood those views and motives. The Journal of the Committee shows that he was generally present and took part in the proceedings, and he was, therefore, fully qualified to speak for the Committee. He was furthermore selected to open the debate on the resolution and to take charge of it in the Senate. The views which he expressed, in view of his own statement, as well as his position, must be regarded as those of the Committee, unless they were contradicted by some of the other members of the Committee. He spoke at considerable length as to the purpose and effect of the first section, saying that it was a general prohibition upon the States, or such, from abridging the privileges and



immunities of the citizens of the United States." The privileges and immunities spoken of, he declared, were those belonging to "citizens of the United States, as such, and as distinct from all other persons not citizens of the United States." These privileges and immunities had never been defined, and it was not his purpose, he said, to undertake to define all of them, though he regarded those spoken of in section two of the fourth article of the Constitution as being among them. He quoted the decision of Justice Washington in *Corfield vs. Coryell* (4 Washington Circuit Ct. Repts., p. 330) to show what some of those privileges were. The Court might, in that decision, undertake to enumerate all the privileges and immunities secured by that section, but said that they might be enumerated under the following general heads: "protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, and otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the Courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the State."

After quoting this decision at some length, Mr. Howard said: "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be, for they are not and cannot be fully defined in their entire extent and specific nature - to these shall be added the personal rights guaranteed <sup>and secured by the first amendments</sup> by the Constitution." He then gave a full statement of the rights secured by those amendments, among which were the freedom of speech and of the press.



etc. (47)

These privileges, immunities, and rights, guaranteed by the second section of article four and by the first eight amendments, had been, He declared, by judicial construction, secured to the citizen solely as a citizen of the United States and as a party in the Federal Courts, and added: "They [the provisions of the Constitution referred to] do not operate in the slightest degree as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation, but applies only to the legislation of Congress."

Congress did not have the power to enforce these guarantees, he declared, since they were not powers conferred upon Congress by the Constitution, nor embraced by that sweeping clause which authorized Congress to pass all laws necessary and proper for carrying out the powers granted by the Constitution. They were, in his opinion, merely a Bill of Rights in the Constitution without power on the part of Congress to enforce it. The States were not restrained from violating those guarantees, he continued, except by their own Constitutions, which might be altered at any time: "The great object of the first section of this amendment is, therefore, to restrain

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(47) His statement of those rights were as follows: "Such as the freedom of speech and of the press, the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; a right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments." Globe, p. 2765.



the power of the States and compel them at all times to respect these great fundamental guarantees."

Mr. Howard stated, however, that the first section of itself did not confer any power upon Congress to carry out these guarantees, but that this power was conferred by the fifth section, of which he said: "Here is a direct affirmative delegation of power to Congress to carry out all of these guarantees, a power not found in the Constitution." According to his opinion suffrage was not one of the privileges secured by the Amendment.

The clause of the first section of which Mr. Howard has been speaking applied merely to citizens of the United States, and did not secure any of these privileges to aliens and other persons. The last two clauses of section one were applicable to all persons, and prohibited the States from denying any one of life, liberty, ~~and~~ property without due process of law, or from denying any one the equal protection of the law. These clauses, declared Mr. Howard, abolished all class legislation in the States and subjected all to the same laws and to the same punishments. He evidently regarded the negroes as citizens, for at this point he stated that they were protected by it in their fundamental rights as citizens to the same extent as white men. In concluding his remarks on the first section, Mr. Howard stated that if the Amendment were adopted by the States, the first section taken in connection with the fifth would prevent the States from trenching upon the fundamental privileges which pertained to citizens of the United States. (48)

The declaration of Mr. Howard in explaining the first section of the Fourteenth Amendment could hardly have been stated more clearly and <sup>consequently</sup> equality, and there could be no doubt, it seems, as to its object and purpose. No one could reasonably say, after reading or hearing his speech, that he had been misled as to the purpose and effect of the Amendment. This had been said





in regard to the Thirteenth Amendment, and, with some justification, it must be admitted, but in regard to the Fourteenth Amendment the same cannot be said, for its purpose was clearly and fairly set forth by Mr. Howard and others. His interpretation of the Amendment was not questioned by any one, and in view of his statement made at the beginning of his speech, this interpretation must be accepted as that of the Committee, since no member of the Committee gave a different interpretation or questioned his statements in any particular. Nor was his position denied by any of the minority, for in fact the minority opposed the Amendment for the very reasons which he gave in support of it, this especially being the objection given by Mr. Rogers in the House.

Mr. Wade, on the same day that Mr. Howard spoke, moved a substitute for the entire resolution, but the only change in the first section was to substitute "persons born in the United States or naturalized by the laws thereof" instead of "citizens of the United States." (49)

This substitute was proposed on account of uncertainty which was involved in the term "citizens". Mr. Wade himself, so he says, had no doubt about who were comprehended by the term "citizens", but since the courts had thrown some doubt over the question, he thought all doubt should be removed. His substitute would thus make the privileges and immunities applicable to negroes whether they were held to be citizens or not. In this respect he regarded his substitute as an improvement over that of the Committee, and this was true in so far that no doubt could be entertained as to the persons who were to be protected in their rights and privileges. Mr. Wade was not the first to observe that the very people whom they intended to reach by the resolution might be excluded on the ground that they were not citizens, since the Civil Rights Bill might not be held to be constitutional, for Mr. Stewart



had on May 14, 1860, proposed an amendment to the resolution defining what was meant by the term "citizens" as used in the first section. (50).

Mr. Howard evidently saw the weight of the observations of Mr. Wade and of the suggestion in the amendment of Mr. Stewart, for when the resolution was before the Senate, May 29, he moved, by way of Amendment to section one, that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." (51) This was to form the first part of section one, and with that added, no further changes were made as regards that section, for with this exception, it stands in our Constitution today in the form which was given it by Mr. Bingham in the Committee. This Amendment of MR. Howard was important in this respect, not that it conferred any power upon Congress, but that it put beyond doubt and cavil in the original law, who were citizens of the United States. The first clause of the section one thus makes federal citizenship <sup>primary</sup>, since ~~evidence~~ is all that is necessary to state citizenship if one be a citizen of the United States. When that clause becomes a part of a fundamental law, the States could no longer determine its citizenship and thus the citizenship of the United States as in former years. This clause was not the main purpose of the section or of the Amendment, however, as has been declared by some. It cannot reasonably be maintained, we think, that the prime and controlling purpose of the Amendment was <sup>not</sup> to define citizenship. As important as that may be, it was by no means the motive which induced Congress to ingraft that amendment upon our Constitution. It seems that this position is clearly and undeniably borne out from the fact that the Amendment as it passed the House had no clause defining citizenship, nor <sup>has</sup> ~~did~~ the Committee deem it of sufficient importance to include it in the resolution, which was reported to the two Houses, and this,

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(50) Ibid., p. 2560.

(51) Ibid., p. 2865.



of itself, is sufficient evidence to make this conclusion almost inconvertible. It was only when it was seen that there might be some doubt as to who would receive the benefits of the section, that it was deemed of sufficient importance to claim the attention of the Senate. Many thought, and their opinion might have been sustained by the Courts, that all free persons born in the United States were citizens, and since the negroes were now free, they would also be included. But it was to leave no room for doubt that the first clause was added, and can, therefore, not be regarded as the motive actuating the men when they adopted the resolution. Mr. Howard said that he regarded it as merely declaratory of what was already the law, but that it was desirable that the question as to who were and who were not citizens of the United States be settled, since it had long been a great desideratum in our jurisprudence and legislation. (52) We find it nowhere mentioned in the debates that it was the leading purpose of the resolution or Amendment to settle the question of citizenship.

Mr. Doolittle seemed to fear that Indians born in the United States would become citizens by this Amendment, and so amended it by saying "excluding Indians not taxed." (53) Mr. Howard replied that this was unnecessary since Indians, who maintained tribal relations, were and always had been regarded as quasi foreign nations, thus not being embraced by the Amendment. Mr. Doolittle said that citizenship, if conferred, would carry with it all the privileges, ~~rights~~ rights, duties, and immunities which it was the object of this Amendment to extend. While recognizing the importance to be attached to the clause ~~beginning~~ <sup>le</sup> beginning "citizens", he did not lose sight of the main object of the Amendment. Mr. Trumbull claimed that "subject to the jurisdiction" of the United States meant subject to the complete jurisdiction, thus not including Indians. (54) Mr. Howard said that Mr. Doolittle's amendment, if accepted, would result in an

(52) Ibid., p. 2890.

(53) Ibid., p. 2890.

(54) Ibid., p. 2893.



actual naturalization whenever any State saw fit to tax an Indian, and that this objection was sufficient to secure its rejection. He was not prepared, he declared, to have the Indians become his fellow-citizens, to vote with him, and to hold lands and deal in every other way that a citizen of the United States had a right to do. (55) It would seem from this statement that Mr. Howard regarded suffrage as a privilege of citizenship, though he had stated in his opening speech that it was not.

Senator Johnson, of Maryland, approved of both Mr. Doolittle's amendment to exclude Indians and the clause defining citizenship. He thought that the latter was a wise and necessary provision, since, according to commentators and the decisions of the Courts, a citizen of a State became ipso facto a citizen of the United States, and since there was no definition as to how federal citizenship could exist except through the medium of state citizenship. (56)

Mr. Doolittle also <sup>^</sup>changed that the first section was intended to give validity to the Civil Rights Bill, pointing to the fact that Mr. Bingham, who had opposed that bill, had introduced it. Mr. Fessenden replied that the Committee of Fifteen had never <sup>^</sup>discovered it in his presence with the view of making that bill valid, and that furthermore that bill was not discussed in that connection at all, the section being based on entirely different grounds. Since Mr. Fessenden was frequently absent from the meetings of the Committee, it is possible that references may have been made to the Civil Rights Bill during his absence. Mr. Howard, moreover, stated that it was the purpose of the Committee to put the Civil Rights Bill beyond <sup>the</sup> legislative power of those who wished to deprive the freedmen of their rights, <sup>^</sup>this apparently acknowledging that it was one of the purposes of the Amendment to incorporate that bill into the Constitution. (57)

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(55) Ibid., p. 2895.

(56) Ibid., p. 2893.

(57) Ibid., p. 2896.





Mr. Williams, of Oregon, pointed out the fact that the second section precluded the idea that the first section conferred citizenship upon Indians, since only Indians that were *taxes* were to be counted in the basis of representation. Mr. Saulsbury, of Delaware, who was opposed to the whole Amendment, opposed Mr. Doolittle's Amendment on the ground that Indians were as much entitled to citizenship as the negroes. The Amendment was then rejected by a vote of 30 to 10. Mr. Howard's amendment defining citizenship was then agreed to without a division. (58) This amendment, with the others which he submitted, was sufficient to attach his name to the Fourteenth Amendment, for it was often referred to merely as the Howard Amendment.

Mr. Hendricks, who was later the Democratic nominee for Vice-President, said that the first section failed to define the rights and duties, the obligations and liabilities of citizenship, but that they were left as unsettled as they had been during the entire course of our history, though he declared that negroes, coolies, and Indians would be admitted to citizenship by it. (59)

Mr. Poland, Of Vermont, said that the privileges and immunities to be secured by the second clause of the first section were those found in the *section* section of the fourth article of the Constitution, but since there was no power in Congress to enforce them, it was desirable that such power be given. The last two clauses were said to be in the Declaration of Independence and in the Constitution, evidently meaning some or all of the first eight amendments, since one of the clauses was taken from the Fifth Amendment. But state laws, he continued, existed in violation of those principles. Congress had shown its desire and intention of uprooting such partial legislation as existed in certain States by passing the Civil Rights Bill, but since there were doubts in the minds of some as to the constitution-

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(58) Ibid., p. 2897.

(59) Ibid., p. 2939.



ality of that bill, he thought those doubts should be removed by putting this section into the Constitution, thereby empowering Congress to enforce the fundamental principles of our government. (60).

Mr. Howe, of Wisconsin, said that among the rights and privileges of citizens were the right to hold land, to collect wages by process of law, to appear in court as a suitor for any wrong done or right denied, and to give testimony, but that these were not the only rights that certain States had or might deny. He cited a law of Florida where only negroes were taxed to support their own schools, and declared that such laws as this would not be possible under the Amendment. (61)

Mr. Henderson, of Missouri, said that the persons declared to be citizens by the first section were already citizens under a fair and rational interpretation of the Constitution of 1787, and that the remaining clauses or provisions of that section merely secured the privileges and rights which attach to citizenship in all free governments. The aim of the Freedmen's Bureau and Civil Rights Bills, he declared, was to break down the system of oppression that existed in the South. The Civil Rights Bill was to carry out section two of article four, he declared. Had the proposition which he introduced earlier in the session been adopted, continued he, the necessity for the whole Amendment would have been removed. This proposition was to inhibit the States as to discrimination against persons on account of race or color in prescribing the qualifications of voters. (62)

Mr. Johnson, who <sup>eventually</sup> finally affiliated with the Democrats, favored all of the first section except the clause which prohibited States from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." His objection to this clause was that he did not know what ~~its effect~~ its effect would be, though he was present when Mr. Howard

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(60) Ibid., p. 2961.

(61) Ibid., Appendix, p. 219.

(62) Ibid., pp. 3031 - 35.



gave his exposition of it. He therefore moved that the clause referred to be struck out, but his amendment was rejected. (63)

An effort was made by the opponents of the Amendment to have the various sections of it submitted as separate amendments, hoping thereby to secure the rejection of some of them, but the advocates of it refused to grant this. This was the first instance in which either Congress or the States had to accept or reject an Amendment composed of such disconnected subjects.

The resolution was then passed by the Senate, June 3, 1866, by a vote of 33 to 11, 5 being absent, with Stockton's seat still vacant. (64)

The resolution, as amended in the Senate, was brought before the House the next day, June 9, at which time Mr. Boutwell gave notice that the Amendments made by the Senate would be called up June 13. Immediate action was doubtless postponed to give the majority time to consult and decide as to the course which they should pursue in regard to the Amendments. When the question was called up by Mr. Stevens on the appointed day, one house was given to the minority, to be used as they saw fit, notice having been given that the previous question would be called at 3 or 3:30 o'clock. Mr. Stevens stated that the Union portion of the Reconstruction Committee had examined the Amendments proposed by the Senate, and that they unanimously reported that the House ought to concur in them. (65)

Very little was said in regard to the first section, but what was said only corroborated the expressions previously made as to its effect. Mr. Harding, of Kentucky, an opponent of the measure, said that it transferred to Congress all the powers of the States over their citizens, and that Congress would then have all legislative power. (66). Mr. Baker, of Illinois, speaking of it at a later date, July 9, said that he considered it important as cleaning away bad interpretations which had been given to the Constitution rather than

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(63) Ibid., p. 3041.

(64) Ibid., p. 3042.

(65) Ibid., p. 3144.

(66) Ibid., p. 3147.



as adding a positive grant of New power. (67)

The Amendment<sup>of</sup> the Senate <sup>was</sup> concurred in by the House by a vote of 120 to ~~32~~<sup>32</sup>, 32 being absent. (68) Not a single Republican voted in the negative this time, since the Senate Amendments were considered more favorable than the original sections.

We have already noted what the members of the House thought and intended to accomplish by the first section of the Amendment, and since that section was not modified in the Senate except by the prefixing of the clause declaring who were citizens of the United States, thereby merely determining to whom the privileges and immunities guaranteed in that section should apply, we may say that there is no cause or reason to change the conclusion which has been previously given.

If the analysis of the debates in the Senate<sup>be</sup> closely followed, the reader will see that the expressions or declarations in the two Houses corroborate and strengthen each other. Mr. Howard, the spokesman of the Committee, stated clearly and openly what evils were to be remedied and what objects were to be obtained by it, and there was no contradiction from any source. Many of the Senators and speakers did not refer to the first section at all, while several barely mentioned it. The Speeches<sup>See</sup> of Messrs. Poland, Henderson, Johnson, and Howe, while not say<sup>ing</sup> that the Amendment would have the effect ascribed to it by Mr. Howard, support the position taken by him, especially since none of them questioned his statements.

In conclusion, we may say that Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

(67) Ibid., Appendix, p. 256.

(68) Ibid., p. 3149.





1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the states.
2. To give validity to the Civil Rights Bill.
3. To declare who were citizens of the United States.

As to the first object - the making of the Bill of Rights a force throughout the country by giving Congress power to enforce it - there remains little to be said. We have already observed the statements made in regard to this purpose in the course of the debates, and we feel little hesitancy in saying that it was unquestionably one of the leading motives for the inclusion of this section in the Fourteenth Amendment. Congress was also given power to enact such legislation as it might deem "appropriate" to enforce this purpose. We will have much evidence to support this conclusion when we come to consider the legislation which Congress enacted to enforce the provisions of the Fourteenth Amendment.

As to the second purpose, or motive, to give validity to the Civil Rights Bill, we may state briefly the following facts. We have already referred to Mr. Fessenden's statement, but even granting that many or most of the majority believed in the validity of that bill, it remains to be said that some of the best <sup>constitutional</sup> substantial lawyers, notably Messrs. Johnson and Bingham, thought quite differently. There is also evidence to show that the friends of the measure were <sup>not</sup> so certain of its constitutionality, for they thought it advisable to put that question beyond dispute and cavil. This attitude on the part of many is shown by the debates, though there is another motive which should not be lost sight of. This was the fear that the Civil Rights Bill would be repealed as soon as the Democrats came into power, which was contingently it was feared would take place at an early day. This reason was quite frequently stated, and no doubt it had some weight.

It cannot fairly be said, however, as was charged by some in the debate, that the men who supported the first section of the Fourteenth Amendment thereby acknowledged the unconstitutionality of the Civil Rights Bill, thus



stultifying themselves, for it is quite possible that a man may be practically certain in his own mind that a measure is constitutional and yet may fear that the courts will take a different view of it. It is no doubt true that some, who doubted the constitutionality of the bill, voted for it, for several acknowledged that they had their doubts about it, and a few, blinded by partisan jealousy and sectional hate, may have voted for it while believing it to be unconstitutional.

It was a time when party spirit was at its height, but it is absurd to make a wholesale charge that the great majority of those who voted for the bill believed that they had no power to pass it. There is little doubt that the bill was unconstitutional, and that the federal Supreme Court would have so declared it, had it come before that body, but the fact remains that the vast majority of those voting for it must have <sup>thought</sup> ~~thought~~ they had the power to pass it.

It may be well to consider the causes which induced Congress to engraft the first section upon the Constitution. We have considered some of these reasons in connection with the report of the Reconstruction Committee, but principally in connection with the passage and enactment of the Freedmen's Bureau and Civil Rights Bills. The debates show that frequent reference was made to the discriminating legislation of the Southern States, the oppressive and unequal laws as regards the negroes. Of course these laws were the excuses if not the cause<sup>s</sup> for passing such bills for the final incorporation into our fundamental law of that section which forbids all manner of discrimination and requires that all shall have the equal protection of the laws. These causes - the so-called "black laws" of the South - were unquestionably exaggerated, only the <sup>worst</sup> ~~most~~ instances being given and then no allowance whatever being made for the altered position of the negro. Apparently the Radicals did not see, or, if they did not see, <sup>and</sup> ~~ignores~~ the fact that there was any need of stringent vagrancy laws under the conditions in which the South was placed after the surrender of Lee.



vagrancy laws under the conditions in which the South was placed after the surrender of Lee. The political theories and philosophy of Sumner and other Radicals never took into consideration the well known fact that the best of theories often do not work well in practice. Only in the highest developed and most advanced of enlightened communities can abstract ethical and political theories be applied with safety. All men are equal before the law is an axiom that should be realized, and that being true, ~~all men~~ should be realized, and that being true, all <sup>men</sup> should be equally held responsible for the violation of that law and equal punishment should be inflicted.

These were the kind of doctrines that were enunciated by the Radicals who wanted to make a complete change, but it was impossible to put those doctrines and theories into practice. It is a ~~more~~ <sup>settled</sup> practice in law that all men should not be punished in the same degree for the commission of the same crime, as circumstances must be taken into consideration. If anything was true in theory, it must be applied in practice said the Northern reformer. The laws of many of the Southern States may have appeared, on their face, to be unjust, and some probably were, but it was equally certain that they did not work as badly and unjustly as was charged by the reformers and renovators.

Finally, it may be said that the following objects and rights were to be secured by the first section: Life, liberty, and property not to be ~~deserted~~ <sup>denied</sup> to any one without due process of law; trial to be by jury; the ~~accused~~ <sup>accused</sup> to be confronted by the accuser; property not to be taken without compensation; the right peaceably to assemble, to bear arms, etc.; soldiers not to be quartered on any one without his consent; and cruel and unusual punishments not to be inflicted not excessive bail to be required. These, in addition to the rights specifically mentioned in the Civil Rights Bill, were to be secured to every citizen, and it was furthermore declared who were citizens. It also seems quite evident that it was intended to confer upon Congress, by



the fifth section, the power to determine what were the privileges and immunities of citizens, thereby being enabled to secure equal privileges and immunities in hotels, theaters, schools, etc., but this phase of the question will be considered in connection with the subsequent legislation of Congress to enforce the Fourteenth Amendment.

This partial enumeration shows to some extent what Congress intended to accomplish by the first section. We shall not consider here the part it was to <sup>play</sup> ~~serve~~ as a political platform with which to go before the people in the exciting campaign which was soon to follow. The political questions <sup>to be considered</sup> ~~will be considered~~ in connection with other sections, where they more properly belong, which were almost entirely political in their nature.





### Chapter III.

#### The Amendment Before the People and the States.

The Amendment having passed Congress June 13, 1866, was formally presented to the Secretary of State, June 16, and was by him submitted to the several States for ratification or rejection.

Before considering the action of the several Legislatures, it may be well to see what the people in general thought of it, ~~what they understood it to mean~~, <sup>the new Congress</sup> what powers were to be given to Congress and the Central Government, and what evils were to be remedied by it. Our source of information, on this particular question, is, with few exceptions, limited to newspapers, both editorial and correspondence. This will also include the open letters of public men and the speeches made during the campaign.

When the nature of the Amendment proposed by the Committee April 30, became known, it was declared that the object of the first section seemed to have been secured by the Civil Rights Bill, and that the main purpose of the Amendment was, therefore, to keep the South out until after the election. (1) Even as early as December 15, 1865, the purpose of the first section was, it was said, to "confer upon Congress all the powers now exercised by the state Legislatures, and to reduce the States to the conditions of counties." (2) The same writer also asserted that it was proposed to give "Congress absolute power over the social and civil laws of each State." This same paper, which was strongly opposed to the entire Congressional plan of reconstruction, on April 30, following, stated that the whole plan of the Committee had two objects in view: 1. To keep the South out of the Union. 2. To put the onus of its remaining out on the States of that section. The aim of the first, it continued, was to prevent those States from participating in the Presidential

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(1) N.Y. Herald, April 30, 1866. The Herald claimed to be an independent paper but usually supported the administration.

(2) N.Y. Herald, Dec. 15, 1865. To show that reference was held to what finally became the first section. The following resolution introduced by Mr. Wincham in the same editorial: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every State of the Union, equal protection in their rights of life, liberty, and property."



election of 1868, and that if the second was to retain their supporters in the North - the Cardinal principle thus being to keep the Radicals in control of the Government. The Amendment, after its passage by Congress, was declared to be a mere party platform, since it was neither intended nor desired to be ratified. (3) A rather conservative organ said that if the Amendment passed Congress and was admitted to the States, it would secure the next President to the party in power whether it were ratified or not, but stated that the scheme was milder than had been expected. (4) It was predicted that, if the Committee, which was to keep the South out until after the presidential election, could practically be nullified by the pardons of the President, and many thought it could be, something else would be substituted to accomplish the same purpose. (5) As a matter of fact this was done, but probably because the original section seemed too radical and severe, though the above view doubtless had some weight since several members of the House were of the same opinion. The section, as has been stated previously, was retained by the House only by a combination of the extremists of both sides. The Amendment was also declared to be an ingeniously contrived scheme for popular support in the North, while unnecessarily re-enacting the Civil Rights Bill. (6) The paper gave a correct expression of the popular impulse and feeling when it said that the great majority of the people would approve the scheme, which was declared to be a "powerful platform for the approaching fall elections", while the proposition that all should be equal before the law was calculated to have "a pleasing effect upon the popular ear." (7)

The New York Times, a Republican paper, agreed with the Herald and the World as to the main purpose of the Amendment, to secure the presidential election of 1868, though declaring that most of its propositions or provisions

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- (3) Ibid., June 15, 1866.
  - (4) N. Y. Herald, May 1, 1866.
  - (5) Ibid., May 10, 1866.
  - (6) Ibid., June 1 and 10, 1866.
  - (7) Ibid., June 15 and 19, 1866.



were sound, but that the South could not be expected to subscribe to some of them. (8) In fact it went so far as to say that ~~the~~ Mr. Stevens and the Radicals did not want <sup>the</sup> South restored until after that election and that the Committee evidently did not want it accepted by the States. (9) Four days later this same paper stated that all of the sections of the Amendment, except the third, had been acted upon as separate measures, and that the third section had been added for partisan purposes. Mr. Howard's speech of May 23d, was declared to be frank and satisfactory and his exposition of the need for securing, by constitutional Amendment, the privileges and immunities of citizens to be "cogent and clear." (10) It was in this speech that Mr. Howard said that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights. By declarations of this kind, by giving extracts or digests of the principal speeches made in Congress, the people were kept informed as to the objects and purposes of the Amendment. The Senate's substitute for the third section was said to be more acceptable, but that it was too exacting for the South to accept; (11) and that though the Amendment, per se, was just and reasonable, it should not have been made a condition precedent for the admission of the Southern States, since its ratification was practically impossible. (12)

The New York Evening Post, (13) a conservative Republican paper, practically stated the same views as those stated by the Times, but furthermore declared that the first section was unnecessary since the Civil Rights Bill secured the same thing. (14) It also stated that the most thoughtful press either disapproved the Amendment altogether or gave faint praise to it, the third section especially being the object of attack. (15) Extracts from other papers were given in this issue to substantiate the statement. This paper objected to the third and fourth sections on the ground that only permanent things should be put in the Constitution, while the first section was

(8) April 20, 1866.

(10) Ibid., May 25, 1866.

(12) " Sept. 13, 1866.

(14) " May 11, 1866.

(9) Ibid., May 14, 1866.

(11) " June 2, 1866.

(13) " May 1, 1866.

(15) " May 7, 1866.



thought unnecessary unless the Civil Rights Bill was unconstitutional. The Southern whites should be conciliated, it continued, without sacrificing equal justice, free speech, and free press, evidently thinking these things were secured by the Civil Rights Bill. (16) This bill, in the opinion of the Post, was approved by the people. (17)

The New York Tribune, one of the strongest Radical journals in the country, never discussed the different sections of the Amendment, though published several times. It also published speeches made in advocacy of the Amendment and of course advocated its adoption, though its appeals for votes were made more to the passions and selfishness of the people than to their judgments. Moreover, it never denied the statements which were made as to the effect or result on the States in case it were adopted.

The leading organ of the Radicals at Washington declared that the first section embodied the principles of the Civil Rights Bill. (18) This same organ declared, after the Amendment had been adopted by Congress, that "appropriate legislation" would be necessary to give real vitality to it, and that it would be monstrous, "after such an auspicious restoration of peace among men of common sentiments and common obligations" to have differences as to legislation imperatively necessary to enforce an amendment which had cost "so much time, reflection, and research." (19) This was a plain declaration by a Radical organ, and may be accepted as stating the position of the majority, that "appropriate legislation" ought to be passed to enforce the Amendment when it became a part of the original law. The

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(16) Ibid., June 5, 1866.

(17) Ibid., July 5, 1866.

(18) The Washington Chronicle, April 29, 1866. It was published by D. C. Forney, but his brother, J. W. Forney, the Secretary of the State, seems to have written or inspired many of the editorials.

(19) Ibid., June 14, 1866.





second section was, however, declared to be the most important statement that the North would gain 10 representatives and that the South would lose 10, making a total gain of 20 for the North, if the amendment were adopted, and just the opposite if rejected, being inserted in every issue of the papers from September 20 to October 10, 1866. (20) In an editorial on Secretary Browning's letter, it was declared that the independence of the States "within their appropriate and constitutional spheres" was not to be interfered with, though the Federal Government (Congress) would decide as to the spheres. (21) If Congress could say what were the "appropriate and constitutional spheres" of the States, was it not practically admitting the statements made in Browning's letter? In this same editorial it was stated that so long as the States provided for the protection of life, liberty and property of the citizens, the Federal Government would be relieved of an obligation, but the opinion was expressed <sup>that</sup> ~~by~~ federal protection was imperatively needed in certain States. This statement clearly shows that omission on the part of the States to provide for the equal protection of all was to be regarded in the same light as a direct enactment of unequal laws.

The Cincinnati Commercial, a conservative Republican paper, said that the proposal of the first section, while right in principle, was a recognition of a doubt as to the constitutionality of the Civil Rights Bill. (22) The object of the Amendment was declared to be to throw the protecting arm of the Constitution around all classes, native and naturalized. Under the first section no special codes could be passed, as had been done by several States, but that all citizens were to be equal before the law, to have the same rights and privileges, and that the only way this could be obtained, added the writer, was by an Amendment to the Constitution which would enforce it. The people had the right, he continued, to change the organic law when their

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(20) Ibid., Sept. 20, 1866.

(21) Ibid., Oct. 26, 1866.

(22) May 31, 1866.



judgment thought it necessary. (23) It was not denied ~~but~~ that the tendency of the Amendment was towards centralization, but that the people had the right to do this if they saw fit.

Even a New England paper, ~~a Republican paper~~, said that the third section would be fatal to the Amendment, and that the object of the Amendment, taken as a whole, was to prevent the restoration of the Southern States until after the presidential election. (24)

Mr. Tremain, president of the Republican State convention of New York, declared, in a speech before that body at Syracuse, September 5, 1866, that the first section was necessary on account of the Dred Scott decision and to make the Civil Rights Bill permanent by putting it beyond the power to repeal, or of the Courts to declare it unconstitutional. (25) The Convention adopted the resolutions advocating the Amendment and declaring that the New Orleans riot was due to the President's policy of reconstruction.

The Herald, which had at first made quasi objections at least to the Amendment, said that there was nothing very objectionable in it, but that every principle of it had, at one time or another, been recommended by the President to some Southern State or ~~another~~, and that he should have accepted it. (26) In this same issue a correspondent had written that the first section would only extend federal protection over, and provide equal laws for, all classes of citizens in the several States. This would certainly mean that the Federal Government would be empowered to pass laws insuring such protection and securing equal privileges.

(23) Ibid., June 21, 1866. "It is ~~then~~ <sup>such</sup> nonsense to talk about a centralized despotism making inroads upon the Constitution, changing the form and sweeping away ancient prerogatives and immunities. The people have a clear right to make changes in their organic law as in their judgment are demanded."

(24) Ibid., May 6, 1866. Quoted: Springfield (Mass) Republican.

(25) N. Y. Herald, Sept. 6, 1866.

(26) Ibid., Sept. 13, 1866.



Thus it will be seen, ~~as think~~, that the Northern press, with few exceptions, if any, took the view ~~that~~ that the first section of the Amendment re-enacted, or gave authority for, the Civil Rights Bill, and conferred citizenship upon the negro, thereby nullifying that portion of the Dred Scott Decision which had denied this under the original Constitution. As a general thing the press did not go into any elaborate discussion of the Amendment itself, but spoke of the possibility of its ratification. Many speeches and letters were, however, published in regard to it.

Probably the strongest and most illuminating letter giving an exposition of the Amendment was that written by Secretary Oliver H. Browning to Colonel W. H. Banneson and Major H. V. Sullivan. It was written October 13, 1866, and was given a wide publication, with much comment on it by the leading papers. In this letter Mr. Browning, who was a member of the President's Cabinet, declared that new and ~~erroneous~~ <sup>destructive</sup> powers would be conferred upon Congress by the proposed Amendment; that it would be possible to destroy the judiciaries of the States under it; and that the object and purpose of the clause "nor shall any State deprive any person of life, liberty, and property without due process of law" was to subordinate the state judiciaries to federal supervision and control, thereby totally annihilating the independence and sovereignty of state courts in the administration of state laws, as well as destroying the authority and control of the States over purely local affairs. He also asserted that, since the federal judiciary already had jurisdiction of all questions arising under the Constitution and laws of the United States, this new provision would make possible the drawing of every matter of judicial investigation, civil and criminal, however insignificant, into the vortex of the Federal judiciary. For it was certainly possible, he continued, for either party to a controversy to claim that he was being deprived of life, liberty, ~~and~~ property, as the case might be, by the States ~~would~~ without due process of law, and that this question would be cognizable in a federal court, resulting in delay if nothing else. There will be a tendency, he says, on the part of



the Federal Government to take away the control of local affairs from the people, the States, and the local municipal bodies, and ~~to~~ concentrate it in its own hands. (27) The editorial comment in the paper from which the letter had been taken never controverted the statements of <sup>Browning</sup> as to the effect of the first section, but rather admitted them by saying that the danger to our country was disintegration, not consolidation.

The editorial comment of the New York Times, October 25, in regard to this same letter did not deny any of the statements made in it, but said that it was impolitic to publish it since it was supposed to express the views of the President. The same paper, three days later, seemed to admit <sup>Browning's</sup> contentions by saying that the dangers set forth in his letter could be avoided ~~if~~ the States would act justly - would deprive no one of life, liberty, or property without due process of law. It evidently agreed, however, with the declaration made in that letter that any one who alleged that he was deprived of <sup>any</sup> of those things, could bring his case before the Federal Courts. If that much be granted, then ~~the whole case falls~~, and <sup>Browning's</sup> position becomes unanswerable. To show further the view taken by the Times in regard to the Amendment, citation was made in the same editorial of the case of James Lewis, colored, which ~~was decided~~ by Justice Hardy of Alabama. In that case the Civil Rights Bill was declared unconstitutional, the decision of the lower court, fining the negro for carrying arms, being sustained. The Times added that this could not ~~have~~ been done had the Amendment been a part of the Constitution, and that its object was to prevent such legislation and such decisions.

The Herald of the same date, also writing of Browning's letter, declared it to be the old Southern State's ~~right~~ argument with secession eliminated, though it did not contradict any of the statements made in the letter. The Tribune practically acknowledged that the position taken by Mr. Browning





was unassailable, but declared that the arguments used by him to reach his conclusion were too trivial to be refuted. This seems contradictory, but in regard to the clause which Mr. Browning especially attacked, it declared: "It is enough to say that fact as well as theory requires that this principle should be embodied in the national Constitution. The Rebel States have repeatedly and grossly outraged it, and it is because life, liberty, and property have been illegally taken away in spite of mere state laws, that the Federal Government is bound to extend equal protection to all citizens." (28) If this quotation does not practically admit the declaration of Mr. Browning that the control of local affairs would be taken away from the States and given to the General Government, then we have failed to understand it. There is also this important fact to be noted. The editorial which we have quoted clearly stated that it was the purpose of the amendment, that is of the first section, to extend the equal protection of the laws, not only in cases where the laws are unjust and unequal, but in cases where people are denied equal treatment in spite of state laws. The laws might be fair and just, but their execution might not be. In other words, the Federal Government was to see to it that all were equally protected, whether this equal protection was denied by the States or by individuals. This distinction is very important as will be seen in the chapters that are to follow.

It was feared by some that the Amendment would have the effect of postponing reconstruction and that what had been gained by the Civil Rights Bill, which secured freedom of speech in every part of the Union, might be lost. (29) It was later asserted that the first section was the same as that bill, (30) this being unnecessary unless that the latter was unconstitutional<sup>at</sup> a concession which was not admitted. (31)

In the previous chapter we have given the opinion of the Civil Rights Bill which was generally held by the press of the country and by the people.

(28) October 25, 1863.

(29) N. Y. Evening Post, May 1, 1866.

(30) Ibid., May 11, 1866.

(31) Ibid., June 5, 1866.



To have in this Chapter given some instances where it was stated that the first section was but a re-enactment of that bill. It is but proper, however, that further evidence should be given to see whether that was the general impression. The press, with few, if any, exceptions, either held this view or uttered no opinion on it. We find that no one denied this contention at all, though many claimed that it did more than merely re-enact that bill.

The views expressed by the papers were verified by the speakers during the Campaign, many of whom were members of Congress. Senator Trumbull, in a speech at Chicago, August 1, said that the first section was a reiteration of the Civil Rights Bill, probably a needless reiteration, but that it was thought proper to put it in the fundamental law. (32) Mr. Colfax, Speaker of the House, expressed the same view at Indianapolis a week later, saying that the Amendment was necessary to keep the Southern judges from declaring the bill unconstitutional. (33) General Lane, at Indianapolis, and General Schenck, at Dayton, declared the same thing on August 13. (34) Both of these were members of Congress. Senator Sherman, at Cincinnati, September 23th, said that the first section embodied the Civil Rights Bill. Hannibal Hamlin, who later became a Senator, made the same declaration at Philadelphia, October 17. (35) Carl Schurz, in an Article in the Atlantic Monthly for March 1867, asserted the same thing. Mr. Whipple, in the same magazine for November 1866, gave expressions to a similar view.

Since the Amendment was, in theory at least, the main issue of the Campaign, the speeches which were made should be of much help to us in determining what the people understood by it for a vigorous campaign was waged and great crowds attended the rallies. Mr. Colfax, in the speech to which we have already referred, seemed to think that freedom of speech would be secured by the Amendment, for he said: "I desire that in this free land every freeman shall speak his honest sentiment without fear of molestation." Mr. Handricks, who

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(32) Cincinnati Commercial, August 7, 1866.

(33) Ibid., August 9, 1866.

(34) Ibid., August 22, 1866.

(35) N. Y. Herald, October 3, 1866.



was one of the few Democratic Senators, declared ~~on~~ the next day at the same place that negroes would demand to hold office and to sit on juries if the Amendment were adopted, and that even suffrage might be granted under the first section. (36)

Mr. George W. Morgan, the Democratic nominee against <sup>Mr.</sup> Columbus Delano, who was a candidate for re-election, declared in a speech August 21, that the first section was a bold stride towards centralization; that under it the Federal Government would claim the power to define the rights of citizens of the States; and that there would be in a short time negro jurors, voters, judges, and legislators in Ohio by virtue of laws of Congress. He then asked the people if they were prepared for such a state of affairs, and that if they were, advised them to vote for Delano, ~~since~~ <sup>because</sup> he would aid in putting them on an equality with the negroes. (37)

Mr. Bingham, the author of the first section, asserted, in a speech at Bowerstown, Ohio, August 24, that that section was a strong, plain declaration that "equal laws and equal and exact justice" should be secured in every State "by the combined power of all the people of every state." (38) This declaration certainly warrants the conclusion that the local affairs of the States were to be interfered with and that equal protection was to be secured by the Federal Government, whether it was denied by States or by individuals. Mr. Hannah, a former United States District Attorney for Indiana, said that those who opposed this section sanctioned class legislation and were willing to permit <sup>the</sup> States to deprive American Citizens of life, liberty, and property without due process of law. (39) Judge Perkins, of the same State, declared that the Amendment was a stab at the right of the States to control their own affairs, and asked where was ~~to~~ the limit of the power of the Federal Government. (40) Hon. George H. Pendleton, Democratic nominee for Vice-President in 1864, said, in a speech at Edinburg, Indiana, that the effect of the Amendment would be to make a consolidated government. (41) Delano, in a speech

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(36) Cincinnati Commercial, Aug. 9, 1866.

(37) Ibid., Aug. 27, 1866.

(38) Ibid., Aug. 27, 1866.

(39) Ibid., Aug. 27, 1866.

(40) Ibid., Aug. 29, 1866.

(41) Ibid., Aug. 30, 1866.



at Coshocton, Ohio, August 23, where his opponent, Morgan, had spoken a week before, declared "that suffrage was not granted by the Amendment, but that it was a guarantee that the Federal Government would protect its citizens in their civil rights. (42) General M. F. Force, who was a candidate for a judicial office, said, in a speech, September 22<sup>d</sup>, in reply to the objection that the clause about due process of law would give the federal courts occasion to interfere in local affairs, that in the first place federal judges were as good as state judges; and in the second place, that it was no new phase, since the Constitution already provided that the National Government should not deprive any citizen of life, liberty, or property "without due process of law", and that he desired to see this cornerstone of liberty, the law in every State. (43) He evidently thought that the first section would make the national "due process of law" the law of every state. Since this clause, as used in the Constitution and exercised in the Courts, requires a jury trial, it would follow that the States could not deprive any one of life, liberty, or property without a trial by a jury composed of twelve men. This was no doubt the general understanding of the clause. Judge T. W. Bartley, at Cincinnati, September 29, in reply to Sherman's speech of the night before, said that the first section, together with the fifth, practically made the Federal Government absolute, since Congress was given the power to define and determine the privileges and immunities of American citizens, thereby being able to confer suffrage. (44)

Mr. George W. Weston, of Bangor, Maine, who was said to be the founder of the Republican newspaper, in a letter to the editor of the New York Tribune, June 25, 1866, gave his approval to the first clause of section one, saying that it was desirable that they become a part of the Constitution. It was a great misfortune, he declared, that these clauses were inextricably mixed up with a clause having no relation to the rights or interests of the negroes. The last clause was the objectionable one. The words of it, he said, had a pleasing sound to the ears,

(42) Ibid., Aug. 31, 1866.

(43) Ibid., Sept. 24, 1866.

(44) Ibid., Sept., 30, 1866.





but that the people should not on that account be deceived as to their effect in this new form. He called attention to the fact that Congress and the Federal Government were already restrained in this particular by a similar clause in the Bill of Rights, which was enforceable by the federal judiciary. Similar provisions in the Constitutions of the several States restrained their respective Legislatures, while these safe guards were enforceable by the state judiciaries. This had been the case since 1789, he continued, and, with no grievance to which public attention had been called, it was <sup>not</sup> proposed, in the third generation after the Fathers, by a provision applicable to 30,000,000 of whites as well as to 4,000,000 of blacks, "to place the protection of life, liberty, and property against state legislation, under a national guaranty, which will be enforceable by the federal judiciary." The clause which declared that no State should "deny to any person within its jurisdiction the equal protection of the laws" was sufficient to put an end to all caste distinctions and was all that was necessary for the security of the blacks. Under the last clause, he asserted, nearly every case could be brought before the federal Supreme Court under the plea that "due process of law" had been denied. Furthermore, it involved a revolution of our judicial system, being "an alarming concentration of power in the central tribunals, and a prostitution of the independence of the States in many and vital particulars. It is in all respects as wholly uncalled for and gratuitous as it is indefensible and dangerous." He also objected to the third section, and concluded by saying: "The terms of settlement which are offered are shameful, both to the victors and the vanquished, and are more <sup>to</sup> us than to them." It was also stated in the letter that he was in sympathy with the Republican party, but that he could not support the Amendment on account of the dangers in it. (45)

Statements like these are entitled to much weight, for they come from a source naturally in sympathy with the party which proposed the Amendment, ~~and~~ <sup>and</sup> ~~the~~, was, however, forced by principle, on account of the danger in it, to oppose it,



while at the same time stating that there were good clauses in it which he would like to see adopted. The view taken by Mr. Weston was no doubt that of many, and especially that of lawyers, jurists, and people who were able to analyze the Amendment.

The National Intelligence, of Washington, declared that the ~~proposed~~ fifth section authorized Congress to enact any law which a mere majority might deem necessary to secure equal rights to all classes of citizens, and that this would result in an invasion of the power of the States to legislate, with a consequent centralization of power in the hands of Congress. (46) The same paper said that, under the first and fifth sections, Congress might declare that suffrage was a privilege, thereby annulling state laws requiring residence, payment of taxes, etc. This might also be made to include the right to hold office. Congress could also constitutionally extend the jurisdiction of the federal courts, continued the writer, to include all manner of cases, even so far as practically to destroy the local governments and state judiciaries. The opinion was also expressed that the people did not intend to clothe Congress with such power nor did they intend to express by their votes a desire that the Federal Government should be put in a position so to cripple the power of the States. He seemed to give his approval to the other provisions of the Amendment, but said that his objections to these were invincible. (47) This declaration was made after the overwhelming victory of the Radicals, and cannot, therefore, be charged with a partisan motive.

The great object of the Amendment, another paper asserted, was to take away the power of the people and to place it in the hands of a political party in Congress. "In its whole tenor, scope, and design, it is opposed to every conceded and sound principle of Republican government. It belongs only to a fatherless despotism." (48)

The declarations and statements of newspapers, writers and speakers,

(46) Ibid., Oct. 25, 1866.

(47) Ibid., Nov. 17, 1866.

(48) Pittsburgh Post, Sept. 26, in World, Nov. 5, 1866.



which we have given, show very clearly, it seems, the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight amendments were to be made applicable to the states or not, whether the privileges guaranteed by those amendments were to be considered as privileges secured by the Amendment, but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it.

It is proper, at this place, to see what view was taken of the Amendment in the South. Only a few references are necessary to show that the opinion which prevailed generally in the South was similar to that held in the North. The Charleston Courier approved the interpretation which Mr. Browning gave of it, in that it conferred new and enormous powers upon Congress and was fraught with evil. (49) This same paper published, with apparent approval, the messages of Governor Jenkins of Georgia and Governor Walker of Florida to the same effect. (50) Another leading southern paper took an even stronger position than did the Courier. It is declared that the negro, being made a citizen by the first section, was to be placed on an equality with the whites as well as to be given protection before the Courts in all his civil rights, the latter of which Georgia had already done. It was then asked where was the limit to the power bestowed upon Congress by the fifth section. The following statement of Governor Sharkey, of Mississippi, was also quoted approvingly: "Should the Amendment become a part of the Constitution, we shall have a far different government for that inherited from our fathers;" and to this the editor added; "Then indeed will the Sun of Liberty have set in the South." (51) In another issue the editor discussed and approved the interpretation given in

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(49) Nov. 1, 1865.

(50) Nov. 7, 1865.

(51) Atlanta Intelligence, Oct. 4, 1865.



the letter of Mr. Browning. (52)

Another very influential paper asserted that the first section which struck at the foundation of American liberty, changed the character of the government, transferred from the States to the General Government the right to define the qualifications of their citizens, and obliterated the rights and powers of municipal authority in the States. It was also declared to be clearly evident, from the language of the section, that the Civil Rights Bill, the provision of which ignored and set aside the jurisdiction of the Civil courts of the States over their own internal municipal regulations was to be given constitutional validity or authority. (53) The editor called attention to the fact that little attention was given to the first section, though he regarded it as the most dangerous part of the whole Amendment. Two days later, this same writer, who was an exceptionally strong man, declared that the States would be made the executive dependencies of a consolidated despotism by the Amendment and that the conclusion was inevitable that the designs of the Radicals, as shown in the Amendment, were to merge all the reserved powers of the States in the Central Government.

Later in the campaign, the same paper said that the New York Herald, the Raleigh Standard, and the Newbern Times proceeded upon the idea that the third section was the most offensive to the South, but again reiterated its statement of an earlier date that this was not the case, but that the first section was the objectionable one. (54) "The (Radicals)" continued the Sentinel "who understand the bearing of the Amendment upon the organic law and genius of the Government, keep their deep and revolutionary designs out of the view of the people, North and South, altogether, and only dwell upon the demagogical features of the Amendment. They know that to talk of disfranchising 'rebels and traitors' is a sweet sound to the ears of the Northern people. But we repeat what we have before said, the disfranchising clause is the objectionable

(52) Ibid., Oct. 30, 1866.

(53) Raleigh Sentinel, June 30, 1866.

(54) Ibid., Sept. 19, 1866, in the World of Oct. 20.





feature of the Howard Amendment."

The first sentence of this quotation is an admirable statement of the actual condition at the time as the aftermath clearly shows. We have already noted the ~~fact~~ that most of the attention of the speakers during the campaign was given to the second, third, and fourth sections, the "demagogical features" or partisan elements of the Amendment, and that little stress was put upon the first and fifth sections. It would seem that the Sentinel had given the proper reason for this. A later statement of the same paper is almost equally as significant. (55)

The same writer also maintained that the first and fifth sections contained the germ of consolidation as well as the destruction of the efficiency, if not the very existence, of the state governments. Congress was empowered by the fifth section, he continued, to pass any law necessary to enforce the Amendment, and might, under this provision, declare that suffrage was a privilege which could not be denied by state law. There was nothing, he asserted, in the Constitution which would render such a law unconstitutional, and that it would clearly be within the province of Congress to define citizenship and the privileges with which it should be endowed. Congress would also be empowered, he added, to organize such courts and bureaus as it might deem

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(55) Ibid., Oct. 9, in World of Oct. 29, 1966.

The editorial is in part as follows: "That Amendment, we hold, is adverse to the innocent and rightful powers of the States, provides for and looks to a solid sovereignty, instead of a government of limited powers, breaks down the wholesome checks of the Constitution and the state governments, and must inevitably result in universal negro suffrage, ~~not~~ by the free, voluntary consent of the people of the States, but by the future forced action of Congress and the consequent transfer of municipal control of the State Governments over their internal affairs into the hands of Congress. We believe that this is a wrong - a wrong which neither Providence indicates nor the results of war render necessary or proper."



proper, to give jurisdiction over a particular class of persons to these courts, and to permit them not only to sue and be sued, and to testify, but to be jurors, lawyers and judges. In conclusion he asked: "What evil, then, could Congress fasten upon the Southern States which is not constitutionally and legally provided for in this Amendment? Is there not more reason to hope for a change of a bad law than to change a bad constitution?" This writer was not opposed to an Amendment fixing a just ratio of representation, and amendment defining treason and its punishments for the future, and amendment declaring the Union indissoluble, or an amendment preventing the States from abridging in any manner the civil rights of the negroes, but was opposed to Amendments like the Howard Amendment which, he asserted clearly violated "the principles of the Constitution as it now is." (56)

The Nashville Union and American said the Amendment was the initial step of the Radical plan for centralizing power in the Central Government and for keeping the government in control of the Radical States, and that one who could not see this was incompetent to advise men of intelligence as to their rights and interests. (57) The Florida Union of Jacksonville, declared that the Amendment would destroy the old Constitution, with its system of checks and balances, would tear away the safeguards of the States, and would give the Federal Government power to control the local affairs of the States, even to the extent of declaring who should hold office. (58) The Louisville Journal, October 9, 1866, said it tended towards centralization and encroached upon the domestic independence of the States, and was furthermore partisan, unequal, unjust, and inexpedient. (59) The Memphis Avalanche, November 17, 1866, said that it had been the "war cry of the partisan leaders in the late struggle on the hustings and at the ballot-box," and that it meant, to northern people, negro

(56) Ibid., in World for Oct. 29, 1866.

(57) World for Oct. 29, 1866.

(58) Ibid., also in McPherson's Scrap Book, "The Fourteenth Amendment", p. 40.

(59) Ibid., p. 27.



equality, social and political, but not applicable to themselves. (60) The Montgomery Mail, February 1967, said the chief objection to the Amendment was the first section which "forbids a State from depriving him [a negro] of any rights or privileges which a white man may possess." (61)

The Picayune, of New Orleans, said that the first section was but an incorporation into the Constitution of the Civil Rights Bill. (62) An opponent of the Amendment said that it secured the negro the right to vote, to sit on juries, to enter hotels, lecture rooms, etc. (63) The Vicksburg Herald was of the opinion that the Radicals neither expected nor desired the South to adopt the Amendment, its object being to keep that section out until after the presidential election. (64)

A press correspondent, seemingly a Republican, said that the Democrats of Kentucky feared that Congress would be empowered by the Amendment to confer the suffrage. The writer further said that the Amendment admitted negroes to the witness stand, the jury box, street cars, good seats in public conveyances, good accommodations at hotels, the public schools, and all other civil rights which white people enjoyed, and that if it went this far, the Democrats reasoned that it might go further. (65) It was stated by the Vicksburg Republican, after the Amendment had been declared a part of the Constitution, that, under the first section, negroes were entitled to sit on juries, and advised them to see that they were granted this right. (66) The Philadelphia News, July 31, 1966, maintained that the elective franchise was one of the privileges secured by the Amendment, not only to negroes, but to women and children. (67) This was an unusual view, however, and while the paper seems to have bitterly opposed the Radicals, this statement can hardly be said to have been made for partisan purposes since it had been announced more

(60) Ibid., p. 47.

(62) Ibid., p. 26.

(64) Ibid., p. 27.

(66) Ibid., p. 37.

(61) Ibid., p. 9.

(63) Ibid., p. 24.

(65) Ibid., p. 34.

(67) Ibid., p. 77.



than a week before that the Amendment had been ratified.

Mr. Benjamin H. Hill, of Georgia, who was later elected Senator, stated, in an open letter to the editor of the New York Herald, that the South accepted the conditions of the President without complaint as well as the Freedmen's Bureau and Civil Rights Bills without representation, but that they objected to the requirement of Congress that they disfranchise their leaders.

(68) Mr. Hill was a Union man.

The statement which we have given seems amply sufficient to show that the southern press and people discerned the tendency of the Amendment and pointed out their objections to it. The objection to the third section was probably the one which influenced the great mass of the people more than any other. That section was easily understood and its effect could be seen and felt, and as became a brave and noble people they would not willingly consent to the degradation and punishment of their own leaders, for they were unable to see that their leaders were more deserving of such treatment than they themselves were. But for this section, the South, under the circumstances, might have been induced to give its assent to the Amendment in order to regain its position in the councils of the nation, though this may be doubted. With that section in, however, they preferred to endure military rule rather than humiliate itself by deserting its brave and loyal leaders.

It is a rather striking coincidence that the thoughtful men, North and South, regarded the first section, in connection with the fifth, as the most objectionable of the entire Amendment, for in it they saw the possibility, and no doubt the purpose, of a strong consolidated Federal Government, with greatly enlarged powers put into the hands of Congress. These views were presented to the people in able letters and editorials, and many were undoubtedly aware of the dangers pointed out. So many questions, however, were presented that some of these dangers were lost sight of, but we shall not at present consider the motives which induced the great majority of the people to give their assent to the Amendment.





Amendment in the U. S. Congress for its ratification.

It now became our duty to trace the course of the Amendment before the Legislatures of the several States and to determine, if possible, what they thought it meant and what reasons were given for its approval or disapproval.

Connecticut was the first State to take action on the Amendment, which had been submitted to the Secretary of State on June 18, 1866, and by him submitted to the several States. There was no delay in Connecticut, for the Governor of that State sent it to the Legislature on June 19. A motion was made in the Senate that the consideration of the Amendment be postponed until the next General Assembly. This was done no doubt for the purpose of giving the people an opportunity to ~~exchange~~<sup>substantiate</sup> their opinion, but the motion was defeated. The Amendment was ratified in the Senate by a vote of 17 to 6, June 25, after a short debate. The House, two days later, ratified it by a vote of 125 to 32. It was a party vote in both houses, the Democrats opposing it on the grounds of expediency and policy, and declaring that Congress could not change the Constitution during the enforced absence of certain Representatives from Congress. The Republicans contended that Congress had all the powers of conquest against the conquered rebels. (69)

New Hampshire followed close upon the heels of Connecticut in taking action, for the Legislatures of these two States were in session at the time. On June 26, 1866, the House Committee reported a resolution for the ratification of the Fourteenth Amendment, the minority submitting a report with their objections. The resolution was debated at some length, June 26, 27 and 28, and was adopted on June 29, by a vote of 207 to 112. (70)

The minority report gave the following reasons, among others, against the ratification of the Amendment:

1. Because the States most deeply interested were unjustly excluded from all participation in Congress on the subject of the Amendment.

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(69) Senate Journal of Comm., 1866, p. 774, and Annual Cyclopædia, 1866, pp. 255 - 56.

(70) House Journal, 1866, p. 271.



2. Because there was nothing in the condition of any section of the country to render the Amendment necessary.

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4. Because there were several Amendments in one, each of which should be given separate consideration and action, and not be acted upon as a unit.

5. Because the proposed Amendment is ambiguous or contradictory in its provisions, the first section prohibiting any State from stripping the privileges of citizens of the United States, the right of suffrage being claimed as one of those privileges, and the second section, by inference, allowing the States to restrict the right of suffrage if willing to submit to the consequent disabilities.

"6. Because said Amendment is a dangerous infringement upon the rights and independence of all States, North as well as South, assuming as it does, to control their legislation in matters purely local in their character, and impose disabilities on them for regulating, in their own way, the right of suffrage, - clearly a state right, - a right vital to the theory of our government, and most sacredly guarded by the framers of the Constitution.

7. Because there was no corresponding reduction in direct taxes for loss of representation.

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"12. And finally, because the only occasion and real design of the proposed Amendment is to accomplish indirectly what the General Government has and should have no power to do directly, namely, to interfere with the regulation of the elective franchise in the States, and thereby force negro suffrage upon an unwilling people." (71)

The fifth, sixth and thirteenth sections of this report show clearly what the minority thought would be the effect of the Amendment. The sixth



reason is especially important since it shows that the view, which was later held by many eminent men, to be the true interpretation of the Amendment, was perceived at this early date. It is to be regretted that we have no record of the debate which took place, for we are unable to know what answers, if any, were given to the above objections. In all probability, however, the plea for its ratification was made on the ground that the "rebels and traitors" should be punished, that one "rebel" in the South should not have as much power as two or three loyal men in the North, that the "rebel debt" should not be paid, and that the loyal debt should be secured.

The Senate Committee reported the House resolution favorably on July 2, a minority report identical with that made in the House being submitted. The resolution was debated July 5 and 6, passing the Senate on the latter date by a vote of 9 to 3. (72)

The third State, strange to say, which considered the Amendment, was Tennessee. The Legislature of that State was not in session at the time, but a special session was called for the purpose of ratifying the Amendment. The Legislature met in accordance with the summons of Governor Brownlow, sometimes called Parson Brownlow, July 4.

In the Senate it was proposed to submit the question of ratification or rejection of the Amendment to the people, but this resolution was defeated. Senator Frazier then offered an Amendment to the resolution proposing the ratification of the amendment. This Amendment was in the following terms: "Provided, that the foregoing proposed Amendment to the Constitution of the United States shall not be so construed as to confer the right of suffrage upon a negro, or person of color, or to confer upon such negro or person of color the right to hold office, sit upon juries, or to intermarry with white persons; nor shall said proposed Amendments be so construed as to prohibit any State from enacting and enforcing such laws as will secure these ends, not inconsistent with the present Constitution of the United States, nor shall said (72) N. H. Senate Journal, 1865, p. 94.



proposed Amendments be so construed as to abridge the reserved rights of the States in the election and qualification of their own officers, and the management of their domestic concerns, as provided and secured by the present Constitution of the United States." This Amendment was rejected, and the Amendment was then ratified by a vote of 16 to 14. (73) There was very little, if any debate, in the Senate, but the Amendment proposed by Senator Frazier shows what the minority thought would be the construction put upon the Amendment. It is of course evident that a State, through its Legislature or otherwise, cannot limit or extend the construction or interpretation of a proposed Amendment to the Constitution of the United States, but its effort to do so would be a clear indication of what it feared would be the construction of the proposed Amendment. The effort of the minority to do this in this particular case is of importance only as showing their views on the Amendment. It may not be altogether proper to say that the majority, by rejecting Senator Frazier's Amendment, recognized that the Amendment would secure those things which his Amendment proposed to include, and that they, therefore, intended to secure them. In ordinary cases, it would be perfectly proper to draw such a conclusion, but in this case the reason for the rejection of the Amendment of the minority might properly have been that the Legislature had no right to pass such a restrictive resolution, or in other words, to make a conditional ratification of the Amendment. It is evident, however, that if Dr. Frazier's interpretation or limited construction were to be placed upon it, that the first eight Amendments would not be made binding upon the States.

There was no quorum in the House for sometime, so that nothing could be done except to adjourn from day to day. After considerable effort, two of the members were arrested and brought into a Committee room opening into the Chamber of the House. They refused to vote when their names were called, whereupon the Speaker ruled that there was no quorum. His decision, however, was overruled, and the Amendment was declared ratified, July 19, 1866.

(73) Tenn. Senate Journal (Extra Session) 1866, pp. 19 and 24.





by a vote of 17 to 11, the two members under arrest in the adjoining committee room not voting. (74)

New Jersey followed the example set by Tennessee in calling an extra session of the Legislature. In the latter case it was called ostensibly to elect a United States Senator, but really to pass upon the Amendment. Governor Ward urged its ratification "as the most lenient amnesty ever offered to treason, while every provision is wisely adapted to the welfare of the whole country." This message was sent to the Legislature September 10, 1866, and the Amendment was ratified the following day in the House by vote of 74 to 29 in the Senate it received 11 votes, the 10 Democrats not voting. (75)

The Democrats of New Jersey were successful in the election of 1867, securing a large minority in the House. The Legislature elected at this time met on January 14, 1868, and eight days later the Judiciary Committee of the Senate was instructed to report a joint resolution withdrawing the assent of New Jersey to the Fourteenth Amendment. On January 28, the Committee on Federal Relations (composed of the Judiciary Committee of both houses) reported a joint resolution rescinding the resolution approved September 11, 1866, relative to the Amendment, and withdrawing the assent of New Jersey thereto. (76) The resolution declared that a State had the right to withdraw its assent to an Amendment until it had been ratified by three-fourths of the States. The origin and object of the Amendment were declared to be unjust, and that the necessary result of its adoption would be "the disturbance of the harmony, if not the destruction of our system of self-government." It was also declared that eleven States had been excluded from Congress in order to secure two-thirds of both Houses for it, and, finding that two-thirds of the remaining States would not be obtained, the design was deliberately formed and carried out of ejecting one of the Senators of New Jersey, Senator Stockton. The

(74) Tenn. House Journal (extra session) 1866, p. 25.

(75) Annual Cyclopaedia, 1866, pp. 529 - 40.

(76) N. J. Senate Journal, 1868, pp. 21 and 40.



resolution further declared that no pretext or justification could be given for his ejection, and that it and the Amendment had the same object in view, namely, "to place new and unheard of powers in the hands of a faction. The immense alterations to be made in the fundamental law by the proposed Amendment continued the resolution, were concealed by the gilded propositions of justice which were drawn from the Constitutions of the States. The third section was denounced on account of its ex post facto character as well as for the reason that it conferred upon the legislative branch of the government the pardoning power - a power which properly belonged to the executive.

The resolution further declared that it imposed new prohibitions upon the power of the States to pass laws or to execute such parts of the common law as the national judiciary might hold inconsistent with the vague provisions of the Amendment. The provisions were made vague, it was asserted, for the purpose of facilitating encroachments upon the liberties of the people. The federal judiciary, further more, was to be so enlarged as to bring within its jurisdiction every state law and every principle of common law relating to life, liberty and property. The whole Amendment was couched in ambiguous, vague, and obscure language, the uniform resort of those who seek to encroach upon public liberty." It was also stated in the resolution that this Legislature had the support of the largest <sup>majority</sup> ~~majority~~ ever given expression to by the public will. (77).

The resolution passed the Senate February 19, 1866, by a vote of 11 to 3, (78) and the House concurred the next day by a vote of 44 to 11. (79) The Governor returned the resolution, February 24, without his approval, stating that he did not believe that a State could withdraw its assent to a proposed Amendment, and besides, that the people had approved the Amendment in the election after its adoption and that it had not been mentioned in the campaign preceding the election of the present Legislature. (80) The resolution passed the Senate

(77) N. J. Legislative Documents, 1866, pp. 351 - 53.

(78) N. J. Senate Journal, 1866, p. 188.

(79) N. J. Minutes of the Assembly, 1866, p. 302.

(80) N. J. Senate Journal, 1866, pp. 249 - 53.



a second time, March 8, by vote of 11 to 9, (81) while the House passed it by a vote of 45 to 12. (82) In the House, Mr. Atwater presented a protest for himself and others against the passage of the resolution, but this protest was not allowed to be printed in the Minutes of the Assembly.

The General Assembly of Oregon assembled September 10, 1866, the same day on which the special session of the New Jersey Legislature met. The resolution ratifying the Fourteenth Amendment was adopted by the Senate four days later by a vote of 13 to 8, after having rejected an Amendment to submit the question of ratification or rejection to the people. (83)

On the 17<sup>th</sup> the Senate resolution was reported to the House where it had a somewhat checked history. It was reported back from the Judiciary Committee on the 19<sup>th</sup>, and was agreed to the same day, apparently without debate, by a vote of 25 to 21. A protest was filed by the minority against the passage of the resolution on the ground that it was only considered one day by the Committee; that the minority of the Committee had not been consulted; that some of those holding seats were not entitled to them; and that such an important matter as the Amendment should receive some consideration and deliberation. (84) In fact some of those holding seats were afterwards unseated, thus demonstrating the correctness of the declaration of the minority. Then on October 6, a resolution, declaring the passage of the resolution of September 19 illegal, was adopted by a vote of 24 to 18. This was done on the ground that the passage of that resolution was obtained by the votes of those not entitled to seats. (85) The resolution of October 6 was reconsidered on October 10, and was lost by a vote of 24 to 27, thus refusing to declare invalid the resolution of September 19. (86)

A resolution rescinding the ratification of the Amendment was introduced early in the session of 1868. It was stated in the resolution that the

(81) Ibid., 356.

(82) N.J. Minutes of the Assembly, 1866, p. 743.

(83) Oregon Senate Journal, 1866, pp. 54 - 56.

(84) Oregon House Journal, 1866, pp. 74 - 77.

(85) Ibid., pp. 122 - 92.

(86) Ibid., p. 222.



ratification by Oregon had been obtained by fraud, and that the Amendment was not properly a part of the Constitution, since the Southern States had ratified it under governments created by a military despotism. (86) The Committee on Federal Relations, in reporting the resolution September 22, 1866, declared that the ratification of the Amendment by the last Legislature was one of the reasons of the overthrow of the Radicals at the recent election. The report also stated that the people expected them to rescind the action of the last Legislature. The resolution was adopted October 5, by vote of 13 to 9. (89) The House concurred October 15, by vote of 26 to 18. (89)

Vermont was the sixth and last State to ratify the Amendment during the year 1866. The Legislature assembled October 11, 1866, and the resolution ratifying the Amendment was adopted unanimously by the Senate October 23, the vote being 23 to 0. (90) The resolution was agreed to by the House October 30, by a vote of 136 to 11. (91) There seems to have been no minority report nor any debate whatever.

New York was the first to ratify in 1867, the Legislature of that State meeting January 1. On the first day of the session resolutions were introduced in both Houses for the ratification of the Amendment. Little time was lost in the Senate, for the resolution was referred to a special Committee the next day, and was adopted the day following by vote of 23 to 3. (92) The members of the Senate had been elected in November 1865, but they doubtless considered the success of the Republican party at the polls in 1866 as an expression of the will of the people that the Amendment should be ratified since it had been made the issue in that election. The Senate resolution was received by the House January 9, and was adopted the next day by a

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(87) Oregon Senate Journal, 1863, p. 72.

(88) Ibid., pp. 66 and 171.

(89) Oregon House Journal, 1866, p. 277.

(90) Vt. Senate Journal, 1866, p. 76.

(91) Vt. House Journal, 1866, p. 140.

(92) N. Y. Senate Journal, 1867, p. 34.





vote of 71 to 70. (93) The members of the House had been elected the November preceding, and were, therefore, acting in accordance with the expressed desire of the people. Bernard Oregon, nicknamed "Tom Thumb" on account of his size, was the only Democrat in the House who voted for the Amendment. (94) In fact he seems to have been the only one in any of the Legislatures who did this.

Ohio was equally as prompt as New York in ratifying the Amendment, her ratification being one day later. Governor Cox, (95) in his message to the General Assembly, January 2, 1867, recommended the ratification of the Amendment, declaring that it was necessary to correct the evil remaining in the Southern States. The first section, he maintained, was a grant of power to the National Government to protect the citizens of the United States in their legal privileges in case any State should attempt to oppress any individual or class or to deny equal protection to any one. The necessity for this section, he asserted, had been manifested long before the war, since the freedom of speech and of discussions was not tolerated there prior to the war. The power conferred by the section would remain in abeyance so long as the States acted in good faith and gave equal protection. A resolution for the ratification of the Amendment was introduced in and adopted by the Senate the next day, the vote being 31 to 12. (96) The House agreed to this resolution the next day, January 4, by a vote of 54 to 25. (97) The resolution was not signed, however, until January 11, this preventing Ohio from taking precedence over New York. A resolution was also introduced in the Senate January 3d, to the effect that no Southern State should be admitted into the Union until a sufficient number of States had ratified the Amendment to secure its incorporation into the Constitution of the United States, but this failed to pass. (98)

Ohio has the distinction of being the first State to withdraw its assent to an Amendment to the Constitution of the United States. The Democrats were

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(93) N.Y. House Journal, 1867, p. 77.

(94) N.Y. Herald, Jan. 11, 1867.

(95) Executive Decs. (Ohio) 1866, Pt. I, p. 291.

(96) Ohio Senate Journal, 1867, pp. 7 - 9.

(97) " House " " " p. 12.

(98) " State " " " pp. 3 and 446.



successful in the election of 1867, and when the Legislature assembled, January 6, 1868, resolutions were introduced in both Houses for the withdrawal of Ohio's assent to the Amendment and for rescinding the resolution adopted January 11, 1867.

The rescinding resolution declared, among other things, that the Amendment was ex post facto in its nature and operation, and that it conferred upon Congress the power "to legislate on subjects foreign to the original objects of the Federal Compact." It was also stated ~~to be~~ <sup>to be</sup> one of the objects of the Amendment <sup>to</sup> to enforce negro suffrage and negro equality in the States, and <sup>the</sup> the ratification of it by the previous Legislature ~~was declared to be~~ <sup>was</sup> a misrepresentation of the public sentiment of Ohio and contrary to the best interests of the white race. The resolution passed the House, January 11, 1868, by a vote of 52 to 37. (99)

The resolution was amended in the Senate so as to declare that no Amendment to the Constitution was valid until three-fourths of all the States had duly ratified it, and that until it was so ratified, any State had the right to withdraw its assent. The President was ~~so~~ <sup>he</sup> requested to forward to the Governor of Ohio all papers on file in the Executive Department certifying the ratification of the Amendment by the General Assembly of Ohio, and copies of the rescinding resolution were to be sent to President, to each of the Senators and Representatives of Ohio in Congress and to the Governors of the several States. The resolution as amended was adopted by the Senate, January 12, by vote of 19 to 17. (100) The House agreed to the Amendment by a vote of 50 to 46, (101) and the resolution was signed January 15.

The statement made in the resolution that the Amendment had been ratified against the wishes of the people can hardly be sustained, for the Legislature which ratified it was elected in the fall of 1866 after a full discussion of the Amendment. Governor Hayes, in his inaugural address, 1868, said that the Amendment had been approved by the people and that there was no evidence to

(99) Ohio House Journal, 1868, pp. 31 and 32.

(100) " " " " " " 37 - 38.

(101) " House " " " 44 - 50



that they desired the amendment to be withdrawn. (102) It was also stated that the amendment had been a side issue in the campaign of 1897. (103)

Governor Iglesias, of Illinois, in his message to the General Assembly, January 7, 1907, said that the people had endorsed the Amendment most emphatically, "after a full and deliberate discussion." The Amendment could have been made with propriety before the war, he asserted, but that the necessity for it might have grown out of the war. He thanked all persons born or naturalized in the United States were citizens, and were, therefore, entitled to all the political and civil rights which citizenship conferred. (104) Four days after the reception of this message, the Senate, after a short debate, passed a resolution ratifying the Amendment by a vote of 17 to 8. (105) The House refused, by a vote of 57 to 24 to refer the resolution to the Committee on Federal Relations. It then agreed to the resolution by a vote of 10 to 23, January 15. (106)

West Virginia was the fourth state to ratify the Amendment in January 1897, giving her assent to it the 16th. The vote in that House was 47 to 11, in the Senate 15 to 8. (107)

Kansas disposed of the amendment without delay. The Legislature met January 5, 1897, and on the following day the House adopted a resolution ratifying the Amendment by a vote of 78 to 7. (108) Two days later the Senate concurred, the vote being 23 to 9. Governor Crawford, in his message of the 24th, stated that the Amendment had been the platform submitted to the people in the canvass of 1896, from Maine to California. (109)

102. Kansas House Journal, 1897, p. 7.

(107) Cincinnati Commercial, Jan. 15, 1897.

(104) Ill. Senate Journal, 1907, p. 40.

(105) Ibid., p. 78.

(106) Ill. House Journal, 1907, p. 14.

(107) Documentary History of the Constitution, p. 607, vol. 2, chap. 1, p. 765.

(108) Kansas House Journal, 1897, p. 78.

(109) "Senate " " " pp. 40, 76.



On January 21, 1867, the Committee on Federal Relations reported back to the House of the Maine Legislature the resolution proposing the ratification of the Amendment.

The resolution was given the three readings on the same day, being adopted by a vote of 106 to 12. (110) The most prominent member of the House who voted for the resolution was the Hon. Wm. F. Fife, at present a United States Senator from Maine. The vote in the Senate four days later was unanimously in favor of the resolution. (111) The Republican State Convention (112) at Bangor, June 22, 1866, had emphatically affirmed the Amendment.

There was about as little opposition to the Amendment in Nevada as there was in Maine, for the House ratified January 10, 1867, by a vote of 74 to 4 (113), and the Senate, January 21, by 19 to 7. (114) The members of both Houses had been elected in November 1866.

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(110) Maine House Journal, 1867, p. 79.

(111) Annual Cyclopaedia, 1867, p. 471.

(112) Ibid., 1866, p. 487.

(113) Nev. House Journal, 1867, p. 25.

(114) Nev. Senate Journal, 1867, p. 47.





Governor Fletcher, of Missouri, in his message to the Legislature, January 4, 1867, said that the first section of the Amendment prevented any State "from depriving any citizen of the United States of any of the rights conferred on him by the laws of Congress", and secured to "all persons equality in protection in life, liberty, and property, under the laws of the State."

(113) This is a specific declaration that no state could deprive any citizen of any right conferred upon him by Congress, and it may be inferred that the Legislature gave an implied sanction to it by ratifying the Amendment.

On the day following the reception of the Governor's message the Committee reported back the resolution ratifying the Amendment. There was little, if any, debate on it, and the resolution was adopted the same day, the vote being 26 to 6. (114) On January 8, the House agreed to the Senate resolution by a vote of 85 to 34. (115)

Governor Morton, in his message to the General Assembly of Indiana, January 11, suggested that schools be provided for negroes, advised that separate schools be established on account of the dissatisfaction which would be engendered if they were required to be admitted to the schools for the whites. (116) Immediately after the delivery of the message a resolution was introduced in the Senate for the ratification of the Amendment. This resolution was favorably reported ~~for~~ by the Committee on Federal Relations on January 16. The minority of the Committee filed a report stating that they did not believe that the public mind was at present in a condition for changing the organic law, and recommending that the question be submitted to the people at another time and under more auspicious circumstances. The resolution was adopted, however, on ~~xxxxxx~~ the same day, the vote being 29 to 18. (117)

No speech was made in the Senate in favor of the resolution and ~~any~~ two against it, the previous question having been called. Mr. Hanna spoke for one hour and a half in opposition to it, declaring that the Amendment would

(113) Mo. Senate Journal, 1867, p. 14.

(114) Ibid., p. 30.

(115) McPherson, Reconstruction, p. 194.

(116) Ind. Documentary Journal, 1867, I, p. 21.

(117) Ind. Senate Journal, 1867, pp. 77 - 79



change the whole organic structure of the Government and that it put "the ax to the roots of the tree [the Constitution] itself." (118)

The House Committee, in reporting the resolution, stated that the people had emphatically declared for the adoption of the Amendment after it had been fully discussed. The minority report <sup>says</sup> that the purposes of the Amendment were partisan <sup>in</sup> ~~that~~ it was intended to perpetuate power in the hands of a minority of the people. The report further asserted that the first <sup>section</sup> placed all citizens on a political level and conferred, therefore, upon the negroes the same political and civil rights enjoyed by white persons, including the right of suffrage. It was also stated that the people had been most thoroughly deceived by the Republican orators, and that, if the Amendment was submitted to the people it would be defeated by a 100,000 majority. (119)

Mr. Ross, discussing the Amendment in the House, declared that it would have the effect of striking out the word "white" from the State Constitution and of repealing all State laws making distinctions on account of race and color. He also contended that it would make the negro eligible for seats in the Legislature, would open the jury box to him, and would permit him to send his children to the common schools with the white children. (120) Another speaker declared next day that the Amendment was not sincerely drafted and was intended to destroy the power of the States to determine the status of citizenship, and that its "ratification would be a dangerous, if not a crowning

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(118) The entire sentence was as follows: "It (the Amendment) proposes to change the whole organic nature of our government. It does not purpose merely to lop off from the limb of the old oak ~~and~~ crooked and leafless limb that is thought useless, or to engraft upon some branch of its noble arms additional luxuriance and beauty, but it lays the ax to the roots of the tree itself." Ind. Brevier Legislative Reports, 1867, pp. 44 - 46.

(119) Ind. House Journal, 1867, pp. 101 - 105.

(120) Ind. Brevier Legislative Reports, 1867, p. 80.



step towards that consideration against which the County has been warned by the fathers." He also denounced it as a sectional, partisan effort to confer suffrage on the negroes. (121) Mr. Dunn, speaking in advocacy of the Amendment, said that the interpretation <sup>put</sup> upon the first section in regard to suffrage by its opponents was opposed by the second section. In reply to the objection that it but repeated the principles of the Civil Rights Bill, Mr. Dunn, said: "Well, we propose to make those principles permanent by writing them in the fundamental law." If the Amendment were not adopted, he added, and the Civil Rights Bill should be held unconstitutional, the negroes would be in a worse condition than before their emancipation. (122) Mr. Baker followed Mr. Dunn in opposition to the Amendment, quoting the words of Senator Trumbull to the effect that he hoped to see the day when the judges would declare that the Civil Rights Bill conferred suffrage on the negroes. He then pointed out the similarity of that bill to the first section of the Amendment. (123)

An advocate of the measure said that suffrage was not a privilege of citizenship, and was not, therefore, conferred by the first section. (124) The following significant declaration was made by Mr. Wolfe in explaining his vote. "And there never has been an Amendment to it (the Constitution) but it has been to take power from the General Government and to give it to the people. This Amendment is the reverse of that, therefore I vote 'no'." (125) The statement that suffrage was conferred by the first section was denied by the advocates of the Amendment, but no denial was made to the statement that negroes would be given the right to sit on juries, to hold office, and to attend schools on equal terms, with the whites.

The previous question was called and the resolution agreed to by the House January 23, by a vote of 55 to 36. (126)

(121) Ibid., p. 89.  
 (123) Ibid., p. 89.  
 (125) Ibid., p. 90

(122) Ibid., p. 89.  
 (124) Ibid., p. 90  
 (126) Ind. House Journal, 1867, p. 184.



Scarcely any time was given to the consideration of the Amendment in the General Assembly of Minnesota, for the resolution ratifying it was passed by the House the same day on which it was introduced, the vote being 40 to 15. (127) The Senate, after refusing to submit it to the Committee, concurred the next day, January 16, 1867, by a vote of 16 to 5. (128) The Governor had declared in his message of January 10 that it would secure equal civil rights to all citizens of the United States. (129)

In Rhode Island the Senate ratified the Amendment February 5, 1867, with only two opposing votes, the vote being 26 to 2, while the House ratified it two days later by a vote of 30 to 9. (130)

Wisconsin and Pennsylvania ratified the Amendment on the same day, February 13, 1867. Governor Fairchild, of Wisconsin, in his message January 10, declared that the people were familiar with the provisions of the Amendment, and, "with a full understanding of them in all their bearings", had approved them by an overwhelming majority. He also stated that it had been the basis of the campaign and that most of the members of the Wisconsin Legislature were there because the people knew they deemed the Amendment just and necessary. (131)

The minority of the Committee on Federal relations filed a report setting forth their objections to the Amendment. In this report it was stated that the Amendment would give Congress power to confer suffrage on the negroes and to legislate for the citizens of the several states and that it would surrender certain rights and powers ~~now~~ <sup>then</sup> belong<sup>ing</sup> to the States. This surrender, it was declared, was made by the first section in connection with the fifth. Under the original Constitution, the report continued, the States reserved the right to make laws for the protection of life, liberty,

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- (127) Minn. House Journal, 1867, p. 25.
  - (128) Minn. Senate Journal, 1867, p. 23.
  - (129) Minn. Ex. Doc., 1866 # 66, p. 15.
  - (130) McPherson Reconstruction, p. 194.
  - (131) Wis. House Journal, 1867, p. 38.





and property of those within their borders, but that the first section of the proposed Amendment would make the Federal Government the arbiter between citizens of the same State. Moreover, the Federal Government would have the power to judge state laws and the manner in which the state authority was exercised over its citizens, thereby destroying the harmony between the States and the Federal Government and being a long stride towards consolidation. It was also declared that the numerous rights, for example, the enforcement of contracts, the regulation of the intercourse between citizens, the protection of life, liberty, and property, etc., which were enjoyed under the States, would be put under the control of the Central Government. (132) The Amendment, contended the minority in this report, would work a complete subversion of the "fundamental principles upon which the Union was founded", since Congress would have power to appoint Commissioners and provide Courts to determine whether any one was being deprived of his rights without due process of law.

"If this was not the object of this section of the Amendments," it was asked, "what other purpose or object was sought by it?" The report

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(132) The report is as follows: "The powers of the Federal Government, respecting the people of the States, are mostly external and are seldom felt by the individual or citizen in social or domestic relations. The powers of the State Governments are constantly felt in the regulating our intercourse with each other; in the making of our municipal laws; in the regulating our estates; in our town, village, city and county organizations; in redressing our wrongs and enforcing our contracts; in protecting us in life, liberty, and the pursuit of happiness as members of society. In all these things the power of the State is supreme. The first section of these amendments aims a blow at these powers of the States. All these rights which we now enjoy under state authority, by it are made subordinate to federal power. "The first section, in connection with the fifth, will give the Federal Government the supervision of all social and domestic relations of the citizen in the state and to subordinate State Governments to federal power." Ibid., p. 96.



also asserted that the "absolute rights of personal security, personal liberty, and the right to acquire and enjoy private property, descended to the people of the government as a part of the common law of England," and that there was no necessity of engrafting into the Constitution "nor shall any state deprive any person of life, liberty, and property without due process of law" unless it was intended to confer power upon the Federal Government. Its evident purpose, it was declared, was to <sup>be</sup> <sup>be</sup> construed to subordinate state authority to the Federal Government, and by it, the independence and sovereignty of the State judiciary would be destroyed, and ~~that~~ when this was done, the State would be sovereign in nothing.

In reference to the second section, the report said that it was an invidious distinction, since it allowed the alien non-voters in the North to be counted while the negroes would not, and asked <sup>how</sup> Wisconsin could insist upon it when the people had decided so adversely to negro suffrage in 1865. (133)

There is no record that these statements of the minority were denied, though the vote shows that the majority either did not believe them, or that accepting them, ~~denied~~ <sup>did</sup> to accomplish the purpose for which the minority said the Amendment was intended.

The Senate ratified the Amendment January 23, 1867, by a vote of 22 to 10; (134) the House, February 7, by a vote of 69 to 18. (135)

Governor Curtin, of Pennsylvania, in his message to the Legislature January 22, 1867, referred to the fact that the people of Pennsylvania had had an opportunity to pass on the Fourteenth Amendment and had shown their approval of it by electing a large majority of those who had openly advocated it. (136) On the same day that the message was received, a resolution was introduced in the Senate for the ratification of the Amendment. This resolution, after considerable debate, was passed January 11th, 1867, by a vote of 21 to

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(133) Ibid., pp. 96 - 103.

(134) Wis. Senate Journal, 1867, p. 119.

(135) "House " 1867, p. 224.

(136) Penna. Senate Journal, 1867, p. 16.



11. (137) The House, after a fairly full debate, concurred in the resolution, February 6, by a vote of 62 to 34. (138) The Governor approved the resolution, February 13, 1867.

The debates in the Pennsylvania Legislature were participated in by both parties, and on this account are especially valuable, for the expressions of opinion which are revealed by them show what the majority, as well as the minority, thought of the Amendment. Where these opinions or views are identical, or where the assertions are not denied by the others, they should be given much weight. The debates are given in full, Pennsylvania being the only State which <sup>gave</sup> ~~gave~~ a full account of the debates at that time. It was the only state, too, which gave any considerable time to the discussion of the Amendment.

Mr. Connell, speaking in favor of the Amendment, January 4, 1867, quoted the law of Alabama for the year 1863 making it a crime, punishable by a fine of not less than \$50.00 <sup>or</sup> ~~more~~ than \$500.00, for any conductor, station agent, officer, or employee of any railroad to allow any freedman, negro or mulatto, except nurses with their mistresses, to ride in first class passenger cars. After citing this statute, Mr. Connell declared that the adoption of the Amendment was a political necessity on account of the state of things in the South. (139) An opponent of the Amendment asserted that the people had been deceived as to the purpose of it, being told that it made voters the basis of representation. (140)

(137) Ibid., p. 125. It may be remarked that the only two instances recorded of petitions laid before the Senate of Pennsylvania in opposition to the Amendment, were made by members of the anti-slavery society and by Mrs. E. Cady Stanton, Lucy Stone and others of the Equal Rights Association. The former's opposition no doubt was due to the fact that the second section recognized the right of the states to regulate suffrage - thus being able to exclude the negro; the opposition of the latter was due to fact that suffrage was not granted to women.

(138) Pa. House Journal, 1867, p. 273.

(139) In reference to this statute he said: "Not much Shakespeare in that. That section gives one a glimpse of the poetry, refinement, and humanity of Mississippi (Alabama) life." Pa. Legislative Record, 1867, vol. II (Appendix) p. 3.

(140) Ibid., p. 5.



Mr. Wallace, also an opponent of the Amendment, said that the first and fifth sections taken together declared who were citizens and conferred upon Congress the power to protect that citizenship. He defined privilege as "everything that is desirable" and immunity as "a privileged freedom from anything painful", and asserted that, under the power conferred upon Congress by the second clause of section one, the dearest rights could be bestowed upon negroes. He also maintained that Congress would be authorized to enact laws concerning the regulation and control of liberty and property and to provide for the equal protection of the laws. "If this be the power granted," he added, "which further need have we of the State Government?" He contended that, even if concurrent jurisdiction were granted to the States and to the Federal Government, the latter would be superior, since it would have the right to review the state jurisdiction, (141)

As advocate of the Amendment said that the first section guaranteed "State rights to every human being", evidently having reference to the rights which were in the Bill of Rights in the several States. He also said that this section gave sanction or authority to the Civil Rights Bill, though he thought that bill constitutional without this section. (142):

Mr. Davis, an opponent of the Amendment, declared that the people had not decided for it in the least ~~that the people had not decided for it~~ election, since the issue presented to them had been negro suffrage in some instances, while in others it had been the validity of the U. S. bonds. He said that good Republicans had admitted and claimed that their success was due almost entirely to the immense amount of U. S. securities held by the people, "and to the adroit manner in which that trump card was played." He also stated it as his belief that thousands of ignorant men were induced to vote the Republican ticket by being told and made to believe that the success of the Democrat party would render the Government bonds worthless, but that this

(141) Ibid., p. 13.

(142) Ibid., p. 16.





belief was not entertained for a moment by the shrewd men who played the trick. The mass of the people, he asserted, also believed that the Amendment was to base representation on voters - this view having been presented by the speakers in favor of the Amendment. But the issue was in his opinion, whether the ideas of Jefferson or those of John Adams were to prevail; whether we were to continue to have a Federal Union of States or to have a grand central, consolidated Government, which the domestic laws of the States would be decided by Congress. "The issue is, whether the Constitution of the United States or the will of Congress shall be the Supreme law of the land." (143)

Another Senator declared that the Amendment struck at the very foundation stone of our Republican form of Government. The first section was to meet the doctrine enunciated in the Dred Scott Decision and to validate the Civil Rights Bill. Under this section, he continued, Congress might declare suffrage to be a privilege, since it was susceptible of that interpretation. He cited the case of *Cortfield vs. Coryell* (10<sup>th</sup> Wash. Cir. Court Repts., p. 389) to show that the Court had considered the franchise a privilege. The fourth section was inserted, he declared to secure votes. Of the fifth section he said, "If we are to judge the future by the past, I shall never vote to give Congress any such power. All the dangers that threaten republican institutions are centered in the Congress of the United States,----- I will never vote to enlarge their powers. If I did, I could do it under the conviction that I was voting against the life of the Republic." (144)

In reply to the argument of <sup>the</sup> Democrats that the Amendment was an invasion of State Rights, it was said that the right to define the qualifications of suffrage was not necessarily one of the reserved rights of the States, and that the argument was invalid anyway, since the Constitution provided that three fourths of the States could alter it. (145) This was an

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(143) Ibid., p. 18.

(144) Ibid., pp. 23 - 26.

(145) Ibid., p. 32.



admission on the part of a Republican that Congress would have the right to declare that suffrage was a privilege, and therefore to define its qualifications. This was not generally admitted by them, however, the question either being avoided or the assertion of the minority denied.

An opponent asserted that not only would Congress be empowered to regulate the franchise, but that it would result in the taking of other rights from the States, since the efforts of the Republicans were to centralize the Government. (146) An eminent statesman (Mr. Browning) was quoted as saying that the Amendment would change the entire structure and texture of the Government and sweep away all the guarantees provided by the framers of the Constitution. The speaker then asked whether any rational man could doubt these facts. (147) A Republican went so far as to declare that Congress had the power to change the status of the States if the weal of the Country made it necessary or desirable; that the power of the age and the country was in Congress, as representing the millions of men who had saved the Government and that it was both their prerogative and only to do anything and everything that the peace and perpetuity of the country require and demand. (148)

This is undoubtedly an extreme view - one to which only the veriest Radicals would subscribe, but it shows the spirit of some of the men of the time, and he undoubtedly thought the Amendment was making more sure the powers which he asserted belonged to Congress.

Speaking on another occasion, one of the Senators said that Philadelphia was the only city which did not allow negroes to enter street cars, and that this was contrary to the Republican doctrine that all should be equal before the law. He evidently thought that equality before the law, which was declared in the Amendment, would admit the negroes to street cars, schools, and

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(146) Ibid., p. 35.

(147) Ibid., p. 36.

(148) Ibid., p. 37.



colleges, etc. (149)

The debate in the House was of a nature very similar to that in the Senate. It was asserted by an opponent of the measure that it placed the regulation of the civil relations of each State under the control of the Federal Government; that the States were to act only as the agents or instruments to enforce the federal will, and that almost the entire civil and criminal jurisprudence of the States was placed under the control of Congress. He also declared that it was not necessary, in considering the proposition, to examine the question as to what relations the citizens of the states ought to sustain to each other, but that the only question raised by it, was whether it would be better to give the Federal Government the power asked for by the Amendment, or to leave it where it then was, with the States. He thought it should be the object of all to narrow the grounds of controversy between the States, but that just the opposite would be accomplished by the proposed Amendment, since subjecting the affairs of each State to the control of Congress would enlarge the field of controversy. He then cited the second section of the Civil Rights Bill as an illustration of the manner in which Congress would exercise its power to regulate the affairs of the States, and added: "Under this section the executive, the legislative, and judicial officers of a State may be convicted and punished as criminals. All are subjected to the Supreme law of the Congressional will, which is exercised alike in determining the construction of state laws as well as in prescribing the punishment of those who execute them." (150) Mr. Curtis, an opponent of the Amendment, believed that the first clause would give suffrage to negroes, but whether this clause would ipso facto confer that right might be a question, he said, but that it was quite certain that the first section, taken together as a whole, would give Congress the power, by simple statute, to confer it. It was pointed out that nowhere in the Constitution or in the proposed Amendment

(149) Ibid., p. 84. "Lawful equality must everywhere be freely sanctified throughout this land or we perish. If he (the negro) fills our pulpits, our school-houses, our academies, our colleges, and our Senate Chambers, I bid him God speed."

(150) Ibid., p. 41.



was there a catalogue or enumeration of the "privileges and immunities" of citizens which the States were prohibited ~~for~~<sup>from</sup> abridging by the second clause of section one. Mr. Kurtz then asked: "In case of dispute, where exists the authority to define these 'privileges and immunities'?" The answer was to be found in the fifth section, he declared, which undoubtedly conferred the power upon Congress, and ~~that~~ under that section Congress could also "impose penalties upon all who, under the authority of any pretended state law, should deny or abridge these privileges and immunities." A law of Congress, therefore, he asserted, declaring that suffrage was a privilege, would be Constitutional. He furthermore opposed the Amendment, because, by it, all the legal barriers theretofore existing between the white and black races would be removed, and ~~that~~<sup>that</sup> opportunities and inducements would be given for the Association and commingling of the races ~~on~~<sup>on</sup> such terms of equality as would ~~be~~<sup>be</sup> "naturally resultin the gradual, but certain, blending of the two races into one mixed race or people." (151)

Mr. Mann, an advocate of the Amendment, said that it would enable the Federal Government to accomplish the object for which the founders of the Republic declared that all governments were established, namely, to protect all its citizens in their rights of life, liberty, and property. (152) Two Democrats thought that it would confer suffrage on the negroes and make them the political and social equals of the whites. (153) A Republican thought that it was necessary to adopt the Amendment to secure peace and freedom, including the freedom of speech. (154) Still another supporter of the Amendment declared that ~~they~~<sup>they</sup> proposed to write the Civil Rights Bill into the Constitution and to put the inalienable rights enunciated in the Declaration of Independence in the organic law. (155)

Mr. Deise, a Democrat, asserted that it was a question of centralization, and that the rights of the first section were already safeguarded

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(151) Ibid., p. 59.

(152) Ibid., p. 48.

(153) Ibid., pp. 54, 60.

(154) Ibid., p. 55.

(155) Ibid., p. 60.





in better form by every State of the Union unless it was intended to confer suffrage on the negroes. In reference to the fifth he said that a similar provision of the Thirteenth Amendment had been made the pretext of unlimited appropriations for bureaus and passage of the Civil Rights Bill. "Appropriate legislation" was the invention of Sumner, he declared, and covered a vast deal of ground and involved the expenditure of great sums of money. He was, therefore, opposed to any "appropriate legislation." (156)

Another Democrat, Mr. Chilton, sanctioned all that had been said in regard to the first section as harmless. This section, he declared, had been used to draw attention away from the important sections, and predicted that the people would later be astonished at what had been accomplished. (157)

Mr. Jones, also an opponent of the Amendment, took the position that it should be considered only as to its effect upon Pennsylvania. This was a somewhat narrow position, but it was evidently the view really taken by most of the States, especially in regard to the second section. Mr. Jones declared that the first two clauses of section one deprived Pennsylvania of all legislative power and conferred it upon Congress, and that consequently there would be little necessity of having a Legislature for the State if it were adopted. By the last clause of that section, he continued, the State would not be allowed to be the judge of its own laws, even in criminal proceedings, since it gave the federal courts the power to determine whether a man was imprisoned unjustly or whether he was deprived of his life, liberty, or property without due process of law. He also contended that the rights and prerogatives of the State would be surrendered to the Federal Government without receiving anything in return for that surrender. Congress would, moreover, have the power to enforce the Amendment by appropriate legislation and itself to determine what was "appropriate legislation". He concluded by saying that Pennsylvania would lose one representa-

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(156) Ibid., p. 68.

(157) Ibid., p. 82.



tative under the section unless suffrage was given to the negroes. (158)

The speeches of many of the Republicans did not bear upon the Amendment itself, but were confined to declarations that it was a light punishment for traitors and rebels, that the national debt must be made secure, that the rebel debt should not ~~xxxxxx~~ be paid, and that rebels and copperheads must not be permitted to get control of the Government.

The debates were sufficient, however, to show that the intention and purpose of the Amendment were understood to confer additional power upon Congress and to authorize such measures as the Civil Rights Bill.

The Amendment found little opposition in Michigan, being ratified by the Senate January 15, 1867, by the almost unanimous vote of 25 to 1. (159) On the next day, without any reference to a committee, the Senate resolution was agreed to by a vote of 77 to 15. (160)

Several petitions were presented to the General Assembly of Massachusetts against the adoption of the Amendment, but notwithstanding this as well as the fact the Committee of Federal Relations recommended that it be referred to the next General Assembly, the Amendment was ratified by the House March 15, 1867, the minority report (Republican also) being substituted for that of the majority by a vote of 120 to 22. (161) The Amendment was then adopted by a vote of 120 to 20. (162)

The majority report of the Committee, except so much of it as related to the postponement of the Amendment, was adopted. The reason for the postponement desired by the majority of the Committee was due to the second section, which, it was claimed, conceded the right of the Southern States to disfranchise the negroes, and that Massachusetts would lose by it on account of her educational and tax qualifications for suffrage. (163)

(158) Ibid., p. 27.

(159) Mich. Senate Journal, 1867, p. 125.

(160) Mich. House Journal, 1867, p. 121.

(161) Mass. House Journal, 1867, p. 207.

(162) McPherson, Reconstruction, p. 194.

(163) Ibid., p. 202, and Legislative Documents of the House (Mass.), 1867, Doc. No. 149.



The Committee, in its report, stated that the first section was already in the Constitution and was to be found in the second and fourth clauses of Article Four, and in the First, Second, Fifth, Sixth and Seventh Amendments. If these provisions were fairly construed, said the Committee, they would secure everything which the first section attempted to do. After quoting these provisions, the report continued:

"Nearly every one of the Amendments to the Constitution grew out of a jealousy for the rights of the people, and is in the direction, more or less direct, of a guarantee of human rights.

"It seems difficult to conceive how the provisions above quoted, taken in connection with the whole tenor of the instrument, could have been put into clearer language, and, upon any fair rule of interpretation, these provisions cover the whole ground of section one of the proposed Amendment."

This is a clear statement that the committee considered that the privileges and immunities to be secured by the first section were those enumerated in the Amendment and in section two of Article Four.

The first clause of the section was considered unnecessary by the Committee in view of the opinion of Attorney General Bates that negroes were already citizens. It was also declared that legal authorities were not agreed as to what constituted state citizenship apart from federal citizenship, and that that part of the Amendment "and of the State wherein they reside" would be of no effect anyway, since none of the provisions of the Amendment were to apply to persons not citizens of the United States.

While the first clause of the section was not in the Constitution in the same words, the Committee said that the denial of equal protection of the laws "would be a flagrant perversion of the guaranteed of personal rights which we have quoted" (The Amendments). In answer to the general argument that subordination had existed notwithstanding these guarantees, the Committee replied that this would be possible under the Amendment. The Committee then concluded that the Amendment was more likely to do harm at best, and mischief in that



it was an admission, "either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and, by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter." (164)

This report is entirely different from any other that we have found, for it was made of Republicans, and cannot, therefore, be said to be partisan in the sense that the same statements made by Democrats were. It is also valuable from the fact that it shows that the Senate of Massachusetts, in adopting it, accepted the statements made in it that the first section was but a reiteration of the guarantees enumerated in the Amendments. The Senate ratified the Amendment March 20, 1867, the vote being 27 to 6. (165)

Governor Bullock had, on January 4, in his message to the General Assembly, declared that the first section was to secure to all citizens civil equality before the law and to protect them from any state legislation which abridges their privileges or deprives them of life, liberty, or property without due legal process. He also said that that it was adopted by Congress to give certain and enduring effect to the Civil Rights Bill, and that whatever reasons there were for the enactment of that bill, were doubly applicable to the incorporation of its provisions into the fundamental law of the country. Its reaffirmation in this form was necessary, he continued, to the end that neither the executive nor judicial power, nor the local authorities, might render inoperative the deliberate verdict of the people, "that no one should be denied of their privileges and immunities." (166)

At the third session of the Legislature of Nebraska, which had but recently become a State, the Amendment was ratified by the House on June 10, 1867, the vote being 26 to 11. (167) The Senate rejected the motion to submit the question to the people, and adopted the resolution by a vote of 8 to 5. (168)

(164) Ibid., Dec. No. 149.

(165) McPherson's Reconstruction, p. 124, Mass. Senate Journal not printed according to card catalogs of Library of Congress.

(166) Legislative Documents of the Senate (Mass.), 1867, Dec. No. 1, p. 67.

(167) Nebraska House Journal, 1867, p. 148.

(168) Neb. Senate Journal, 1867, pp. 163, & 174.





Thus within a year from the time that the Amendment was submitted to the States, twenty-two had ratified it, being more than three-fourths of the so-called "loyal States." These were not regarded as sufficient, however, by the great majority of the people. There followed quite a long interval before another state gave its sanction to the Amendment, for not until the Spring of 1868 did Iowa ratify the Amendment. The lower House of the General Assembly of that State ratified it January 27, 1868, the day on which the resolution proposing it was introduced, by a vote of 68 to 12. (169) The Senate agreed to this resolution, apparently without any debate, on March 9, the vote being 34 to 9. (170)

Nearly two years had gone by since the Amendment had been submitted and the assent of the necessary three-fourths was still wanting. Thus far not a single State of the section which would be affected most by the Amendment had given its assent to it, with the exception of Tennessee. And in the case of Tennessee it may be said that it had been ratified against the will of the people of that state. The other states almost unanimously rejected it. Within this time Ohio had withdrawn her assent, thereby giving rise for the first time to the question whether a state could withdraw its ratification of an Amendment before three-fourths of the States had ratified it. New Jersey soon followed the example set by Ohio, while Oregon did likewise the following fall. The border states of Maryland, Delaware, and Kentucky had also rejected the Amendment.

In the Spring of 1866, however, the array of the solid South was broken, Arkansas being the first to ratify. In order to preserve the continuity of the narrative, the rejection of the Amendment by the border and southern states will be considered after we have given an account of the ratification of those States.

Arkansas was the only state which ratified the Amendment by a unanimous vote in both Houses. The vote in the Senate April 6th, 1866, was 23 to

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(169) Ia. House Journal, 1868, p. 132.

(170) Ia. Senate Journal, 1868, p. 284.



O, while that in the House a week later was 56 to 6. (173)

The Legislature of Florida, which assembled June 8, 1868, lost no time in giving its assent to the Amendment, for both Houses passed resolutions to that effect the next day; in the House by a vote of 23 to 6; <sup>(174)</sup> in the Senate by a vote of 10 to 3. (175) Another session of the North Carolina Legislature was called by Governor Holden. The members of the Legislature were elected under an order of general Canby, who had charge of the Military District of North and South Carolina. The North Carolina Assembly acted with the same promptness that was shown in Florida, for it met July 1, 1868, and on the next day both Houses ratified the Amendment. The vote in the Senate was 34 to 2; (174) in the House, 82 to 18. (175) Louisiana and South Carolina followed soon after, both ratifying it July 9, 1868. In South Carolina, the vote in the Senate, July 8, 1868, was 23 to 5, (176) while that in the House the next day was 108 to 12. (177) In the Senate of Louisiana the vote was 22 to 11, July 9, (178). Alabama was added to the list of the ratifying states some days later, while Georgia on the 1st of the same month, was the last state to ratify before the final proclamation of the Secretary of the State, announcing that the Amendment had been ratified. Both Houses of the Georgia Assembly ratified the Amendment on the same day, the vote in the House being 86 to 71, (179) while that in the Senate was not given. The States of Virginia, Mississippi, and Texas ratified it after it had been declared a part of the Constitution. In Virginia, the vote in the Senate October 7th, 1869, (180), was 24 to 4; and in the House the next day, 126 to 6. (181) Mississippi ratified it January 17, 1870, by a vote of 23 to 8 in the Senate, and 27 to 6 in the House. (182) Texas ratified it February 18th, 1870, (183)

(171) McPherson, Reconstruction, p. 353.

(172) Fla. House Journal, 1868, p. 9.

(173) S.C. Senate " " p. 6.

(174) S.C. " " p. 12.

(175) Ga. " " p. 21.

(176) Va. " " 1869, p. 27.

(177) Garner Reconstruction in Miss. p. 271.

(174) N. C. Senate Journal, 1868, p. 18.

(175) House " " p. 18.

(176) S.C. " " p. 50.

(177) Ga. " " p. 50.

(178) Va. " " 1869, p. 27.

(181) Va. " " 1869, p. 27.



(18) Documentary History of the Constitution, vol. 11  
pp. 770-791.

Secretary Forward, in his conditional proclamation of July 21, 1868, after enumerating the States whose legislatures had ratified the Amendment, stated that it had also "been ratified by newly constituted and newly established bodies avowing themselves to be, and acting as legislatures respectively of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama." It was also stated in the proclamation that the legislatures of Ohio and New Jersey had passed resolutions withdrawing their consent, but that if the resolutions of three States ratifying the aforesaid Amendment are to be deemed as carrying of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of the said States from such ratification, then the aforesaid Amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

The next day Congress passed a resolution declaring that the Amendment had been ratified. Secretary Forward then issued the Final Proclamation, July 28, 1868 declaring the Amendment a part of the Constitution.



Texas was the first to reject, as well as the last to ratify, the Amendment. The House Committee of Federal relations reported adversely as to the Amendment, October 12, 1866. In their report, the Committee declared that the first section would take away from the States a right which they had possessed since 1776,-- the right to determine what should constitute their own citizenship. The object of this, it was asserted, was to confer citizenship upon the negroes who would thereby be entitled to all the "privileges and immunities" of white citizens, among which were suffrage, participation in giving service, bearing arms in militia and others which did not need enumeration. The negroes were excluded from these privileges by law in most of the original free states, said the committee, and in all of them by immemorial usage. There was scarcely any limitation to the powers sought to be conferred upon the Federal Government by the first election, continued the report, since Congress might declare almost anything even including miscegenation to be a privilege or immunity of ~~xxx~~ a citizen of the United States, which would thereupon immediately attach to every citizen in every state. On the same day that this report was made the House rejected the Amendment by a vote of 70 to 65, (184). The Senate Committee on Federal Relations made a report very similar to that made in the House. The Amendment only received one vote in the Senate, the vote being 27 to 1 against ratification. (185)

Governor Jenkins of Georgia, an old line whig, offered the Amendment in his message. His objection to the first section was that it centralized power in the Legislative Department of the Government by giving Congress the right to settle definitely the question of citizenship in the States,

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(184) Texas House Journal, 1866, pp. 578 - 584.

(185) "Senate" "p. 471.





He declared that under the fifth section, Congress would control that it was the proper judge of what constituted "appropriate legislation", so that no vestige of hope would remain for the southern people "if this amendment were adopted".(186) The House rejected it by a vote of 147 to 2, (187) and the Senate unanimously (38 to 0), on November 9, 1866. (188)

Governor Walker of Florida, on November 14, 1866, submitted the Amendment to the legislature with a message advising its rejection. The first and fifth sections, he declared, conferred upon Congress the power of legislating about everything that touched "the citizenship, life, liberty, or property of every individual" in the country, and made the existence of the Government of the states of no further use. "It is the fact," he continued, "a measure of consolidation entirely changing the form of the Government. The Amendment gave to Congress all the powers which had previously been exercised. He said, by the states over the affairs of individuals. He also pointed out that to vote for the Amendment would be to vote for the destruction of the government of the state, since it would disfranchise the most capable men of the state.

(189) The House committee on Federal Relations took about the same position as that taken by the governor for in its report, November 23rd, it was stated that the first and last sections practically annulled the authority of the states in regard to the rights of citizenship. It was also the opinion of the committee that the elective franchise and the right to serve as jurors would be considered privileges. Congress would also have the power, under the Amendment, said the committee, to annul state laws affecting the life,

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(186) Charleston Courier, Nov. 7, 1866.

(187) Georgia House Journal, 1866, p68

(188) Georgia Senate Journal, 1866, p 72

(189) Florida Senate Journal ~~xxx~~ 1866 p. 8



liberty and property of the people whenever it should deem them subject to the objections therein specified " Since the Amendment would affect the general interests of all the people of the Union, the committee was unable to see how any state could voluntarily invest Congress with such extraordinary power, the whole tendency of which was to the consolidation of the Government. Moreover, the sections were objected to as being ~~concluded~~ in language that was too <sup>general</sup> and questionable." ( 190 ) The Amendment was rejected unanimously ( 49 to 0 ) by the House, December 1, 1866. (191)

The Senate Committee was equally as emphatic as that of the House, for in its report, December 7, it was declared that the States would cease to ~~last~~ <sup>exist</sup> as bodies politic from the moment the Amendment was engrafted upon the Constitution, since Congress would be endowed by it with all the powers which had belonged to the States prior to that time. A great central power at Washington would thus be created it was asserted. Under the first section alone Congress could subvert and change the whole economy of the States, said the report, whether the people of that State approved it or not, for it was appalling to think what power might be seized and exercised under the head of "appropriate legislation". The Committee was also unwilling to surrender the right of the State to determine who should exercise the right of franchise within its limits. (192)

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(190) Florida Journal, 1866, page 76.

(191) Ibid., page 150.

(192) Florida Senate Journal, 1866, page 102.



The Senate unanimously (20 to 9) adopted in 1857 House resolution the same day that its Committee made this report. (137)

The message of Senator Patton of Alabama, November 19, 1866, was very similar in substance to that of Senator Walker. In this message he advised against the ratification of the Amendment on the ground that the first section was of vast, if not dangerous, import, for by it the judicial powers of the General Government would be greatly enhanced, overshadowing and weakening the authority and influence of the State Courts. It might also be possible, he said, to reduce the latter to a nullity, since the Federal Courts would be given complete and unlimited jurisdiction over every conceivable case that might, civil or criminal, however important or trivial. (134)

On December 1st 6th, however, he sent another message advising the ratification of the Amendment as a matter of necessity and expediency.

(134)

To quote his language: "It matters not what might be the character of his case, it might be civil, or criminal. It might be a simple action of debt, or a writ in replevin; it might be an indictment for assault and battery, for larceny, for burglary, for arson, or for murder. It would be all the same. Upon a single complaint that his rights, either of person or property, had been infringed, it would be the bounden duty of the tribunal to which he made his application, to hear and determine his case."

Alabama House Journal, 1866, page 217.



He stated<sup>d</sup> that it was evident that the majority in Congress was determined, "to enforce at all hazards their own terms of restoration", though he added that his views as to the merits of the Amendment had not changed in the least.

He stated that the views given in his first message were based on principle, but that they would look at their true condition and ratify the Amendment in order to be restored to the Union. (195)

This message created considerable excitement and there were chances of favorable action, it was stated, until the receipt of Ex-Governor Parson's telegram the next morning. - It was stated in the telegram that President Johnson was still the friend of the South and on no account should the Amendment be ratified. This is somewhat doubtful, since it was said that the press of the States were almost a unit against Governor Patton's last position. (196) December 7, the day after the receipt of the message, the Amendment was rejected by an almost unanimous vote, 67 to 9 in the House, and 28 to 7 in the Senate. An effort was made in the House to have the question submitted to the people, but this was defeated by a vote of 40 to <sup>2</sup>24. (197)

Efforts were made in January to reconsider the vote on the Amendment. Mr. Parsons wired the President asking what to do. The President replied that there could be no good in doing this, and the matter was dropped. (198)

Governor North, of North Carolina, on November 20, 1865, submitted the Amendment to the General Assembly with a strong passage against its ratification. He held that it had not been proposed by a Congress composed as provided by the Constitution, and that on that account alone,

(195) Annual Cyclopaedia, 1866, p. 18.

(196) McPherson, Scrap-book, "Fourteenth Amendment", pp. 55 - 60.

(197) Ala. House Journal, 1866, pp. 210, 212, and Senate Journal, p. 182.

(198) The Trial of the President, Supplement to the Congressional Globe, 2d Sess., 40th Cong., p. 10.





no State could, with dignity, ratify it. He also pointed out the heterogeneous character of the Amendment, declaring that it was "the first attempt to use omnibus legislation in changing the fundamental law." It was also stated in the message that if the fifth section was but a reaffirmation of what was already in the Constitution, so was claimed by some, it was mere ~~xxxxxxxxxxxxxxxxxxxx~~ surplusage; but if it was intended to enlarge and amplify the various powers "which would be reasonably implied from the sections which precede it, and 'to give to Congress a peculiar authority over the subjects "embraced in those sections, then it was "mischievous and dangerous." The great value of the ~~American~~ American system of government was due to the fact, said the Governor, that a municipal code was provided under the jurisdiction of each state ~~from the~~ trial, by a jury of the county or neighborhood where the parties resided, of all controversies as to life, liberty, or property with the exception of the very limited field of federal jurisdiction. This was to be done anyway, he continued, by the Amendment, since Congress would become the protection of those rights and the "guarantee of equal protection of the laws." Moreover, Congress would be empowered to provide, by appropriate legislation, a system of rights and remedies which could only be administered in the federal courts, thereby transferring to the few points in the state where such courts are held the most common and familiar offices of justice, and to judges and other officers who hold their commissions, not from the people themselves, but from the President and Senate of the United States. "The States, as by so much," he added, "are to cease to be self-governing communities, as heretofore, and trespasses against the person, assault and battery, false imprisonments, and the like, where only our citizens are parties, must be regulated by the Congress of the Nation and adjudged only in its courts." He was unable to believe, he said, that "the deliberate judgment of the people of any State would approve of the innovation to be wrought by the Amendment, and as anxious as he was to see the Union restored, there was nothing in the Amendment calculated to perpetuate that Union, but that its tendency was rather to perpetuate



sectional <sup>alterations</sup> ~~alterations~~ and estrangement. (19)

On November 12, a joint Committee was proposed, to which the Amendment was referred. Four days later, Mr. Logan, of Rutherford County, offered a resolution in the House for the ratification of the Amendment, but it was referred to the joint committee on that subject by a vote of 32 to 16, (200), thus showing the fate which awaited the Amendment itself.

The Committee had the Amendment under consideration for two weeks, making their report, which was a very strong one, on December 6, 1866. The Committee agreed with the Governor as to the wisdom of embracing so many Amendments in one.

In reference to the question whether the Amendment had been proposed constitutionally, it was pointed out that North Carolina and her sister States had been repeatedly re<sup>re</sup>organized "as States in the Union" by all the Departments of the Government, both during and since the war. Several instances were cited to show this. They were also recognized as States, said the Committee, by the submission of the Amendment to them for ratification.

The Committee then proceeded to show that if the assent of those States were necessary <sup>to</sup> ~~to~~ make the ratification valid, it was equally necessary to render the proposal of it valid.

The Amendment was objected to on the ground that it contained provisions of temporary interests merely, and that only provisions made for all times should be incorporated into the Constitution. The privileges and immunities which the States were prohibited from abridging or denying were left in doubt, declared the Committee, since it was not stated whether they consisted only of those which were then supposed to exist or whether they included all others which the Federal Government might thereafter declare to belong to citizens. The latter construction was the more mature,<sup>4</sup> continued the report, and was the one which Congress could insist upon as being both correct and consistent with

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(199) N.C. House Journal, 1866-67, pp. 24 - 30.  
(200) Ibid., p. 31.



the language used. With this construction, what limit was there, it was asked, to the power of the Federal Government to interfere with the internal affairs of the States. "And what becomes of the right of a State to regulate its domestic concerns in its own way? Whatever restrictions any State might think proper, for the general good, to impose upon anyone or all its citizens, upon a declaration by the Federal Government that such restrictions were an abridgement of the privileges and immunities of the citizens of the Union, such State laws must at once be annulled. For instance; the laws of North Carolina forbid the inter-marriage of white persons and negroes. But if this Amendment be ratified, the government of the United States could declare that this law abridged the privileges of citizens, and must not be enforced; and miscegenation would thereupon be legalized in this Commonwealth. Grant that such action on the part of the Government would not be probable, still it is possible; and its mere possibility sufficiently exemplifies the boundlessness of the powers which the Amendment would confer on the Federal Government."

Under the original Constitution, say the report, the municipal affairs and the personal and property interests of the citizens were left to the States, but that this was all changed by the Amendment, for the Federal Government would be authorized to come between a State and its citizens in almost all conceivable cases. It would be empowered "to supervise and interfere with the ordinary administration of justice in the ~~xxxxx~~ State courts, and to provide tribunals, - as has to some extent been already done in the Civil Rights Bill, - to which an unsuccessful litigant, or a criminal convicted in the Courts of the State, can make complaint that justice and the equal protection of the laws has been denied him, and however groundless may be his complaint, can obtain a rehearing of his cause. The tendency of all this is to break down and bring into contempt the judicial tribunals of the States, and ultimately to transfer the administration both in criminal and civil causes, to courts of Federal jurisdiction, is too manifest to require illustration."

In reference to the third section, the Committee said: "What her



(North Carolina) people have done, they have done in obedience, to ~~be~~ our behests. Must she now punish them for obeying her own commands? If penalties have been incurred, and punishments must be inflicted, is it magnanimous, is it reasonable, nay, is it honorable, to require us to become our own executioners? Must we, as a State, be regarded as unfit for ~~pati~~ fraternal association with our own fellowcitizens of the States, until, after we shall have sacrificed our manhood and banished our honor? Surely not. North Carolina feels that she is still one of the daughters of the great family. Wayward and wilful, perhaps, she has been; but honor and virtue still are hers. If her errors have been great, her sufferings have been greater. Like a stricken mother, ~~xxxxsufferingxxx~~ she now stands leaning in silent grief over the bloody graves of her slain children. The ~~momentos~~ of former glory lie in ruins around her. The majesty of sorrow sits enthroned on her brow. Proud of her sons who have died for her, she cherishes, in her heart of hearts, the loving children who were ready to die for her, and she loves them with a mother's warm affection. Can she be expected to repudiate them? No! it would be the act of an unnatural mother. She can never consent to it. Never!"

It was stated in the report that it was impossible to conceive how wide the door was opened by the last section for the interference of Congress "with subjects hitherto regarded beyond its range." One of the most serious evils of the Amendment was declared to consist in the vast addition, made in so many ways, to the power of the General Government. There had already developed, said the Committee, the tendency towards centralization and consolidation, which had been greatly increased by the defeat of the States which had always been the advocates of State Rights; and that even without new constitutional grants of authority, the Federal Government was no longer what it was once, but was now a mighty giant which threatened "to swallow up the States, and to concentrate all power and dignity in itself." This centralizing tendency, continues the report, should be checked rather than fostered, and that





the "American people ought not, by new grants of power, to seem to authorize the continual exercise of extraordinary prerogatives, undreamed of in the purer and happier days of the Republic."

It was the opinion of the Committee that the ratification of the Amendment would not facilitate the restoration of the State, and moreover, that no humiliation or degradation could be deeper than yielding to intimidation and ratifying, through fear, a measure which it disapproved.

Only one member of the Committee refused to sign the report, and his reason for doing so was based on the belief that, in view of all the circumstances, it would be to the interest of the State to ratify the Amendment. (201) It was rejected, December 12, by a vote of 45 to 1 in the Senate, Mr. Harris of Rutherford casting the only vote in favor of the Amendment. (202) The House rejected it by a vote of 93 to 10. (203)

The report of the joint Committee of North Carolina is valuable, not only from the fact that it is the largest and most exhaustive made by any Southern State, but also because it gives the principal objections which induced those states to reject the Amendment with such unanimity.

Governor Murphy, of Arkansas, had recommended the ratification of the Amendment, and a resolution to do this in order "to calm the troubled waters of our political atmosphere" was introduced December 10, 1866. (204) This resolution was referred to the Committee on Federal Relations. On the same day the Senate Committee reported adversely as to the ratification of the Amendment. The report was based on the following grounds:

1. The Amendment had not been constitutionally proposed, nearly one third of the states being excluded from all participation in it.

(201) N. C. Senate Journal, 1866 - 67, pp. 21 - 105.

(202) Ibid., p. 138.

(203) N.C. House Journal 1866 - 67, p. 183.

(204) Annual Cyclopædia, 1866, p. 27.



2. It has not been submitted to the President for his approval,

3. "The great and enormous power sought to be conferred on Congress, under the Amendment which gives that body authority to enforce by appropriate legislation the provision of the first article of State amendment, in effect, takes away from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the State."

4. The second section, whether intended so or not, gave the power to bring about negro suffrage, ~~the~~ with or without the consent of the States.

5. The third section would disfranchise many of the best and wisest men of the State, and must of necessity be rejected.

The Committee thought it preferable to bear their "troubles, trials and deprivations, and ever wrongs, in dignified silence," rather than to commit an act of disgrace, if not, ~~an~~ annihilation, such as would result in the adoption of this Amendment by the Legislature." 205)

This report was adopted December 15, by a vote of 24 to 1. (206)

The House Committee reported against ratification December 17, stating as its reasons for doing so, that the first section made negro citizens and prohibited the States from abridging any of their privileges as citizens of the United States.

The report also declared that Congress would be empowered to define what rights they should ~~enjoy~~ enjoy, and to elevate, them by legislative enactment, to a political equality with the whites. "It also transfers to Congress", continued the Committee, "jurisdiction of the local and internal affairs of the States, virtually destroying the independence of their Courts and centralizing their reserved powers in the Federal Government." The report was adopted the same day by a vote of 68 to 2. (207)

Governor Orr, in his message to the General Assembly of South Carolina, November 27, 1866, recommended the rejection of the Amendment. It

(205) Ark. Senate Journal, 1866, p. 259.

(206) Ibid., p. 262.

(207) Ark. House Journal, 1866, p. 282-291



in his opinion, gave Congress the absolute right of determining who should be citizens of the States, who should exercise the elective franchise, and who should enjoy the rights, privileges, and immunities of citizenship. By it, he continued, the representatives of Oregon or California, or of any State, would be given the power to declare what should be the measure of citizenship in South Carolina or any other State, and this he declared to be an evil, since the citizens of the States were more likely to exercise this power judiciously and intelligently than non-residents who knew nothing of the people, their necessities, resources, etc. "With this Amendment, incorporated in the Constitution," he declared, "does not the Federal Government cease to be one of 'limited powers' in all of the essential qualities which constitute such a form of government?" (208).

About a week before this message was sent, Ex-Governor Perry of the same State, in an open letter to the Editor of the New York Herald (209) asserted that the last section of the Amendment destroyed all the rights of the States and centralized all power in Congress, and that this was done, not openly, but covertly and insidiously.

The Amendment was rejected in the House, December 20, by a vote of 95 to 1. The Senate concurred in the resolution rejecting it, but the vote was not given. (210)

Governor Pierpont, of Virginia, advised the ratification of the Amendment in order to improve the condition of the people, but the Legislature did not follow his advice. The Amendment was rejected by both Houses January 9, 1867, the vote in the Senate being 27 to 0; in the House 74 to 1. (211)

Governor Humphreys, of Mississippi, characterized it, in his message, as an insulting outrage to many of their worthiest men, and as "such a gross usurpation of the rights of the States, and such a centralization of power in

the Federal Government" that the mere reading of it was sufficient to cause its  
 (208) S.C. House Journal, 1866, p. 24.  
 (209) Nov. 22, 1866.  
 (210) S.C. House Journal, 1866, p. 284, and Senate Journal, p. 230.  
 (211) Va. " " 1866-67, p. 103, and " " p. 101.



rejection. (212) Ex-Governor Sharkey, who was Senator-elect from the same State, in a letter from Washington, September, 17, 1866, to Governor Humphreys, called attention to the fact that the Amendment did not enumerate the privileges and immunities for which Congress might provide by the last section. He also suggested that Congress might confer privileges on one class to the exclusion of another class, or might even assume absolute control over all the people and the Democratic government of a State, but he stated that any State which had so little self respect as to adopt it deserved no better fate. To him, however, the fifth section was the Trojan horse of mischief, since it could be construed to empower Congress to do whatever it desired to do.

He then cited a similar provision attached to the 13th Amendment, under which Congress held that it had power to pass the Freedmen's Bureau and Civil Rights Bills. Congress had interpreted the second section of that Amendment, he said, just as he, when Governor of Mississippi, had admonished many members of the Legislature that it would be. He, therefore, thought they should profit by the experience which had been furnished by them by the same provision in the 13th Amendment. (213)

The Amendment was unanimously rejected by both Houses, in the House, January 25, 1867, 80 to 0, and in the Senate, January 30, 27 to 0. (214)

In Louisiana, just as in Arkansas and Virginia, the Governor advised the ratification of the Amendment but, as in those two instances, the advice was not heeded. The Governor did not advise its ratification as a matter of expediency, but ~~it was~~ because he regarded it just and proper, though he thought the States should be required to grant the negroes equal political rights. A joint resolution rejecting the Amendment was almost immediately introduced in the Senate, to which both Houses agreed without a dissenting vote, the Senate February 5, and the House the next day. (215)

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(212) Annual Cyclopædia, 1866, p. 4521.

(213) Atlanta Intelligence, Oct. 5, and N.Y. Herald Oct. 6, 1866.

(214) McPherson's Reconstruction, p. 194.

(215) Ibid., p. 194 and Annual Cyclopædia, 1866, p. 452.





Thus, within less than eight months after the Amendment had been submitted by Congress, every one of the so-called dis-loyal states, except Tennessee, had rejected the Amendment, three of them unanimously, and the others almost so.

Of the three border states which rejected the amendment, Kentucky comes first. There was apparently no debate in either House, the Amendment being rejected by both, on January 8, 1867. The vote in the House was 67 to 27 and in the Senate 24 to 9. (216)

Delaware, one of the three states that never ratified the 13th Amendment, also has the distinction of being one of the three states which rejected and never afterwards ratified the 14th Amendment. In his message to the Legislature, Governor Saulsbury, said that the people had spoken so emphatically against ratification he felt sure that it could be rejected. (217) The Committee in the House reported against ratification February 6, 1867, and this report was adopted by a vote of 15 to 6. The Senate concurred the next day by a vote of 6 to 3. (218)

Maryland followed Delaware the next month, both Houses rejecting the Amendment, March 1867, by a vote of 47 to 10 in the House and 13 to 4 in the Senate. (219)

The joint Committee on federal relations, declared, in their report March 19th, that the proposition, which the States were called upon to ratify, would strictly state of powers most vital to their safety and freedom, and even to their continued existence in any useful way, and would bestow those powers upon the Federal Government, before giving assent to such a proposition. The Committee thought it should be considered in all its aspects and consequences. Maryland's geographical position, her commercial relations with all parts of the Union, as well as her political desire, for the welfare and happiness of the whole Country and her desire for the speedy

(216) Ky. House Journal, 1867, p. 60 and Senate Journal, p. 62.

(217) Del. Senate Journal, 1867, p. 26

(218) Ibid., p. 176, and House Journal p. 225

(219) Md. House Journal, 1867, p. 441, and Senate Journal, p. 898.



restoration of friendly relations between the States, would, ~~and~~ the Committee induce her to make every possible sacrifice to secure the great objects of the Constitution, namely, "To establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, etc." The Committee, however, was unable to see anything in the proposed Amendment which tended in that direction. In order to understand the nature and the objects of the Amendment, they went into the history of it, and examined the grounds upon which its ratification was urged. The report of the Reconstruction Committee was ~~given~~ <sup>very</sup> ~~gone into~~ quite a length, at the conclusion of which the Committee said that the report showed that the avowed purpose was to punish the Southern States and people for the future peace and safety of the country. Two incongruities in the proposition were pointed out: first, that while the demand for conferring additional power upon the Federal Government was presented in the report of the Reconstruction Committee, as if made upon the Confederate states only, it was in fact made upon all the states, since it would be binding on all if ratified; secondly, that while it would greatly diminish the power of the Southern States in the House of ~~Representatives~~ Representatives it would at the same time reduce that of Maryland and other States which stood loyally by the Government. The Committee also reached the conclusion that the Amendment had not been properly proposed — in States being forcibly excluded from all participation in Congress. It was pointed out that there was no thought of compulsory representation in the Constitution and certainly, continued the report, none of forcible exclusion. The same Congress, which excluded the Southern Senators and Representatives had recognized their State Governments as lawfully accepting the ratification of the 13th Amendment by their legislatures, which at the same time claiming and exercising the power to pass the Civil Rights Bill and Freedman Bureau Bill in virtue of that Amendment. The fact that the Amendment had not been properly proposed was of itself an insurmountable obstacle to its ratification by Maryland, but the Committee stated that if this fact were otherwise, the State could not voluntarily assent to any of the propositions of the Amendment. Allusion was made to the danger of



rashly disturbing the admirable adjustment of the balance of powers between the Federal and State Governments, while the passions of men were highly excited, thus rendering them blind to, and regardless of, consequences. The fathers "guarded against the danger of consolidation. That now is the look upon which our ship of state is in imminent danger of being totally wrecked" declared the report.

The object and effect of the first clause of section one was to give Congress, it was asserted, instead of the States, the right to determine who should be deemed citizens of the States, and that residence should be necessary to constitute citizenship. All the provisions of the Amendment, it was stated "must be read in the light of the fifth section, and of the interpretation already given by Congress to the same language in the 17th Amendment". To provide for the protection and regulation of life, liberty, and property was declared to be "the sole and exclusive right of every State", and that the proposition to invest Congress with the power of supervision, interference, and control over State legislation in regard to those questions, was virtually to empower Congress to abolish the State Government.

In regard to the second section the Committee said that it would abridge a right of the States theretofore unquestioned. It was a well known fact, it was stated, that the representation of the South would be constitutionally enlarged by the emancipation of the slaves, but that even then that section would be in such a hopeless minority, that it would be difficult to imagine a higher compliment or tribute than was paid by the Reconstruction Committee to the moral power and intellectual prowess of Southern representatives in the expression of the fear and danger that they would control Congress if admitted without diminished power.

The third section was objected to on the ground that it was exposed fact, and the fourth, ~~xxxxx~~ on the ground that it would inspire apprehension, rather than confidence, in regard to the public debt, and that compensation should be made by the slaves of Maryland. (229)

(229) Laws of Maryland, 1867, p. 870-211, also Doc. M., House Journal, and Documents 1337.



Governor Swann, in his message January 4, 1867, said that it could not have <sup>been</sup> ~~expected~~ notice that the five propositions of the Amendment embodied more than their language would seem to convey. The last clause, he declared, which gave Congress power to enforce other propositions "by appropriate legislation", might leave the Southern and border states at the mercy of a near congressional majority, which might become dangerous to the liberties of the people in times of high party excitement, and sectional altercation. (221)

California is the only state that neither rejected nor ratified the Amendment. The House Committee on Federal relations recommended, March 4, 1868, that it be not ratified while the Senate Committee March 23, reported in favor of ratification (222), but no vote seems to have been taken by either House. This was no doubt due to the fact that the House was Democratic and the Senate Republican so that it was useless to vote. This somewhat extended examination of the action and views of the different states in regard to the Amendment leaves but little doubt as to the view generally held regarding its object and purpose. To be sure, the members of several of the legislatures were elected prior to the submission of the Amendment and on an entirely different issue, so that their action may be said not to represent the will of the people but the command of political leaders. This contention might be well founded in some instances, but when viewed in the light of the elections which were soon to follow, it should have little weight for the Republicans swept the country in the elections of 1868 in almost every state North of Mason & Dixon's line often with increased majorities. It may be properly said however, that if the question of the ratification or rejection of the Amendment had been presented to the people by itself, the result might have been quite different.

The question the people had to decide or to determine in the election was not a simple, but a complicated one. The first section, most important of

(221) Md. House Journal and Documents, 1867, Doc. A. p. 21.

(222) Cal. " " 1867 - 68, p. 611, and Senate Journal, p. 676.





all, was largely lost sight of in the general excitement. Furthermore, the people were not in a frame of mind to consider any question calmly and deliberately, and it was certainly a most inopportune time to secure the sober judgment of the people in changing the fundamental law of the Country.

It may cause surprise that the people and the States were willing to increase the power of the central government to the extent contemplated by the framers of the Amendment, but it does not seem so strange when we consider the circumstances. The people were made to feel and believe that the preservation of the Union was a gain at stake; but if the Amendment was not adopted, the "Rebels" would soon be in control of the Government at Washington, that the national debt would be repudiated; that the Rebel debt would be assumed; that the slaves would be paid for; that treason would be glorified; and that loyalty would be made odious. Many of the people held government bonds and notes, and to insure their payment, voted for the Amendment; others thoroughly hated the South and to weaken the power of that section, supported it; others still wanted to perpetuate their party and saw the opportunity to do this by incorporating the Amendment in the Constitution; why many no doubt were sincere in their devotion to the Union and were willing to do anything for its preservation, and believing the Amendment necessary for this, voted for it. With all these various and heterogeneous elements at work, there is really nothing to surprise that the Amendment was overwhelmingly ratified by the popular vote. Moreover, there can hardly be any doubt but that the action of some of the radical, hot-headed men in the South contributed to swell the Radical majority in the North. The Memphis riots, the riot at New Orleans, and the attitude of many in speeches and acts - all tended to increase the flame at the North, while everything was seized upon by the Radical politicians to show that the South was still rebellious and disloyal, ~~xxx~~ that the negroes would be re-enslaved, and that the Union would be destroyed if the Democrats were once permitted to get control of the Government. One has only to read the speeches made during the campaign to see that



the efforts of most of the political orators were to arouse the passions of the people, to increase their prejudices and hatred to appeal to selfish motives, and to clothe all th<sup>is</sup> so appeals in terms of rights and justice. If there is any surpris<sup>e</sup> it should be the majority was not larger than it really was.

As in all questions of th<sup>is</sup> kind, the great mass of the people never really comprehended the meaning and purpose of the Amendment, and of those who did, many chose that they considered the lesser of two supposed evils - preferring to have the Government in the hands of the Democrats without the Amendment. For the question was so presented as to make it practically impossible to reject the Amendment and still keep the Government in control of the Radicals, since the Legislatures, which were to act on the Amendment, would in many instances, elect United States Senators as well.

In the subsequent chapters, we shall give the interpretation given the Amendment by Congress <sup>C</sup>as well as by the Courts.



Vita.

James Edgar Smith was born at [redacted], North Carolina, May 14, 1873. He received his elementary education from the public schools of [redacted] and the [redacted] Military Academy. He entered Wake Forest College, North Carolina, in the fall of 1893 and received the degree of Bachelor of Arts at Wake Forest in 1896. He was Principal of the Elmont Academy, Lincolnton, N.C., 1896-98. He entered the Johns Hopkins University in the fall of 1897, where he obtained a Master's in Political Science, History, and Political Economy. He was Fellow in Political Science 1898-99.











